No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

Ann Richards, Governor of Texas; Carol S. Vance, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Clarence N. Stevenson, Allan B. Polunsky, R. H. Duncan, Sr., Gilberto Hinojosa, John R. Ward, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under principles of federalism and Article III of the Constitution, federal courts have jurisdiction to decide unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex regulatory scheme when resolution of the dispute was not necessary to provide relief to the Plaintiff prisoner class in a local jail?

2. Whether a federal court's order, based solely on state law, that the state must compensate one of its political subdivisions is in violation of the Eleventh Amendment when such order is not necessary to provide relief to the prisoner class in a local jail?

3. Whether, under principles of federalism, federal courts should abstain from deciding, or, alternatively, certify to the state supreme court, unsettled questions of state law involving a dispute between two levels of state government concerning state fiscal policy and a complex state regulatory scheme, when federal judicial intervention in the dispute is not necessary to provide relief to the Plaintiff prisoner class in a local jail and a state court proceeding involving identical issues and identical parties is pending?

4. Whether state officials can possess the requisite culpable state of mind to be found liable for unconstitutional conditions in a local jail under *Wilson v. Seiter*, ____ U.S. ____, 111, S.Ct. 2321 (1991), when their state law duty to remedy conditions in a local jail was not clearly established and the finding of liability was "tentative" and "contingent" on the outcome of state court litigation?

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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

ANN RICHARDS, GOVERNOR OF TEXAS, ET AL.,
Petitioners

v.

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.,
Respondents

v.

LAWRENCE R. ALBERTI, ET AL.
Respondents

PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit after remand is attached as Appendix A. *Alberti v. Sheriff of Harris County v. Richards*, 978 F.2d 893 (5th Cir. 1992). The order of the panel denying the State's Motion for Panel Rehearing and Suggestion for Rehearing En Banc is attached as

Appendix B. The initial opinion of the Court of Appeals for the Fifth Circuit reviewing the District Court's orders finding liability against state officials and ordering state officials to compensate Harris County is attached hereto as Appendix C. *Alberti v. Sheriff of Harris County v. Richards*, 937 F.2d 984 (5th Cir. 1991), *cert. denied sub. nom. Richards v. Lindsay*, ____ U.S. ____, 112 S.Ct. 1994 (1992). The order of the panel denying the state's Motion for Panel Rehearing in the initial appeal is attached as Appendix D. The decision of the district court finding State Defendants deliberately indifferent after the initial opinion in the Fifth Circuit is attached as Appendix O. The opinion of the district court initially finding liability is attached as Appendix Y. Other district court opinions ordering the deposit or dispersal of monies to Harris County or denying relief from such orders which are the subject of this petition are attached as Appendices I, J, K, L, M, N, O, P, Q, S and U.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1992. A timely filed Suggestion for Rehearing En Banc and a Motion for Panel Rehearing were denied on January 13, 1993. This Petition for Writ of Certiorari is filed within 90 days of the Final Judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. CONSTITUTIONAL PROVISIONS:

Article III, § 2, cl. 1 in pertinent part:

> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States . . .

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or presented against one of the United States by citizens of another state; or by citizens or subjects of any foreign state.

II. STATUTORY PROVISIONS:

Tex. Code Crim. Proc. art. 104.002 in pertinent part:

[A] county is liable for all expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county.

Tex. Gov't Code § 499.071 (formerly Tex. Rev. Civ. Stat. Ann. art. 6166a-4) is attached as Appendix Z.

Tex. Gov't Code § 499.121-499.125 is attached as Appendix AA.

STATEMENT OF THE CASE

I. PETITION INVOLVES FEDERALISM ISSUES OF NATIONAL SIGNIFICANCE AND IS NOW RIPE FOR REVIEW.

This controversy swirls around whether Texas prison officials and the Governor of Texas (hereinafter "State Defendants") bore any liability, especially financial liability, for felons sentenced to the state prison system but confined and maintained in the Harris County jail. State Defendants do not dispute the Fifth Circuit's analysis that this is "*exclusively*" a state law issue and that it presented a "hard question" for the court. Appendix ("App.") C 15. Rather State Defendants maintain that federal courts, especially in a suit between two different levels of state government and involving complex state regulatory policies, lack authority to decide these "hard questions" of "*exclusively*" state law. This is especially so since the dispute involved primarily the fiscal question of compensation to the counties which should only have been resolved on the *terra firma* of Texas politics in the Texas legislature. At the very least, under abstention doctrine, federal courts should have deferred to state courts to avoid decision on the difficult constitutional questions concerning State Defendants' liability under the Eighth Amendment and their immunities under the Eleventh Amendment.

Petitioners recognize they have sought relief or review before this Court on two separate occasions. On March 29, 1991, Justice Scalia stayed the initial order of the district court requiring state officials to reimburse Harris county for cost of transferring to other county jails certain inmates sentenced to Texas prisons. *Richards v. United States District Court for the Southern District of Texas*, ___ U.S. ____, 111 S.Ct. 1409 (1991). The full court subsequently vacated that stay. *Id.* Subsequently, this Court denied certiorari when State Defendants sought precautionary review of the Fifth Circuit's initial decision while the district court's finding of deliberate

indifference was still pending before the Fifth Circuit. *Richards v. Lindsay*, ___ U.S. ___, 112 S.Ct. 1994 (1992).

However, neither this Court's unquestioned discretion to deny extraordinary relief in the context of an interim measure involving the safety and welfare of the inmates in the Harris County Jail nor this Court's wise traditions of justiciability[1] can any longer afford a reasonable basis for denying review of a decision which involves questions of burning importance to the states and our federal system.

Fiscal disputes between different levels of state government should be resolved exclusively by state institutions under our federal system. It is not the proper role of federal courts to permanently resolve perceived gridlocks in state government at the expense of those state institutions. Rather, time and again this court has admonished that these disputes must be resolved delicately with due deference given to state institutions. Most recently in the context of allowing "arms of the state" to take advantage of the collateral order doctrine to appeal a district court order denying an Eleventh Amendment immunity claim, this Court has, with a booming voice, eloquently reafffirmed these principles:

> The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. See *Hans v. Louisiana*, 134 U.S. 1, 13, 10 S.Ct. 504, 506, 33 L.Ed. 843 (1890). It thus accords the States the respect owed them as members of the federation. While application of

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[1] State Defendants' previous Petition for Certiorari, filed as a precautionary measure, could well have been judged premature, since the appeal of the trial court's deliberate indifference finding was still pending before the Fifth Circuit. *See e.g., Brotherhood of Locomotive Fireman and Enginemen v. Bangor and Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967).

> the collateral order doctrine in this type of case is justified in part by a concern that States not be unduly burdened by litigation, its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated.

P. R. Aqueduct and Sewer Authority v. Metcalf and Eddy, ___ U.S. ___, 113 S.Ct. 684, 689 (1993).

That this case arises in the context of perhaps our greatest national malaise, crimina! justice, only heightens its importance. Litigation concerning prison and local jail overcrowding is tragically chronic in our society. In resolving these cases federal courts must work with and respect state institutions and policies. Under the Constitution, federal judges are not intended to sit as criminal justice czars over state criminal justice institutions defining and, in fact here, redefining state fiscal policy.

For all these reasons this case presents issues of profound importance to the nation.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This case arises from *Lawrence Alberti v. The Sheriff of Harris County*, No. 72-H-1094, Southern District of Texas, a class action suit alleging constitutional violations brought under 42 U.S. § 1983 by prisoners in the Harris County (Houston) jail against the Sheriff of Harris County, certain of his employees and the members of the Harris County Commissioners Court (hereinafter "County Defendants"). County Defendants in early 1989 filed a Third Party complaint against Petitioners herein seeking to have the Texas Department of Corrections ("TDC," now called the Texas Department of Criminal Justice-Institutional Division or "TDCJ-ID") accept inmates sentenced to TDC but awaiting transfer in the Harris County jail. The only

real dispute in this case has been between the State and County Defendants.[2]

On September 25, 1989, the *Alberti* court, determining the merits-liability aspect of the case, found the jail unconstitutional and, on the basis of its interpretation of *state law*, held State and County Defendants jointly liable for its unconstitutionality.[3] On February 7, 1991, the *Alberti* court ordered the transfer to other county jails of certain prisoners who were eligible for transfer to TDCJ-ID. These inmates were to "continue to be Harris County prisoners," but, under the terms of the order, Harris County was to be compensated by State Defendants (at a rate up to $40 per inmate per day) for expenditures incurred as a result of the transfers. App. U 6. The district court went on to rule that in light of the unsettled nature of state law, the assessment of costs was "tentative" and "contingent" upon the outcome of state court litigation. App. U 7.[4]

Upon appeal, a panel of the Fifth Circuit acknowledged that this case presented a "hard question" of "*exclusively*" state law. *Alberti v. Sheriff of Harris County v. Klevenhagen*, 937 F.2d 984, 994 (5th Cir. 1991), *cert. denied sub nom. Richards v.*

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[2] The plaintiff class sued Defendants only *after* the second of two trials on liability and at the suggestion of the *Alberti* court. Transcript, Trial of September 12-15, 1989, vol. 1, pp. 5-11; vol. 4(A), p. 83.

[3] The Fifth Circuit had previously ordered "the transfer, to the judge presiding over the *Ruiz* case [*Ruiz v. Collins*, No. 78-H-987-CA (S.D. Tex., Houston Div.), the state prison conditions case], of so much of the remedy portion of the *Alberti* third-party action . . . as seeks to enjoin them to receive or take prisoners to TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." *In Re Clements*, 881 F.2d 145, 153 (5th Cir. 1989).

[4] In a Memorandum Opinion, the *Ruiz* court indicated it would have abstained on the issue of compensation to Harris County. App.T.

Lindsay, ___ U.S. ___, 112 S. Ct. 1994 (1992) (emphasis on original) (hereinafter "*Alberti I*"), App. C 15. However, despite obvious federalism concerns, rather than abstain to an ongoing state court action or certify to the Texas supreme court (which State Defendants urged), the panel adopted the lower court's methodology concerning liability.

> In sum, state courts should eventually determine whether the state or the county is responsible for ready-felons in the county's jails. The *Alberti* court's assessment of costs was "tentative" and "contingent on . . . the outcome of pending litigation in state courts over the allocation of costs for maintaining felons ready for transfer to the TDCJ-ID in county facilities."

App. C 30. The panel then remanded for consideration of this Court's decision in *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991). App. C 34.

The lower court held both State and County Defendants deliberately indifferent under *Seiter*. App. O. The same panel affirmed the lower court's ruling, acknowledging, however, some "force" to the argument that State Defendants could not have acted with deliberate indifference in light of the legal uncertainty of their state law duties. *Alberti v. Sheriff of Harris County v. Richards*, 978 F.2d 893 (5th Cir. 1992) (hereinafter "Alberti II"), App. A 4.

To date, federal courts have, without state legislative authorization, required state officials to directly reimburse a political subdivision of the State of Texas for $12,649,874.25 ostensibly as a component of the remedy in this case. App. F, I, J, K, L, M, N, O, P, and U.[5] Moreover, the lower court has

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[5] App. F is the order of November 23, 1992 which was issued after this appeal. State Defendants request the Court to take judicial notice of this order, which State Defendants refer to solely to show the total amount of compensation they have been required to pay to the County.

recently required the state to enact an additional remedial plan costing millions of dollars and has imposed anticipatory "fines" or "sanctions" of $50 per prisoner per day on the state of Texas for every prisoner over the jail cap after March 31, 1993. App. E, G, and H.[6]

State Defendants seek certiorari to challenge the lower court's jurisdiction to decide this dispute, to correct the lower court's misapplication of principles of federalism and to overrule a finding of deliberate indifference under *Seiter* when state law duties establishing the responsibility of a state actor are not clearly established and the liability finding was admittedly "tentative" and "contingent."

III. STATEMENT OF FACTS

The panel acknowledged in *Alberti I* that the threshold question of these state officials' liability for inmates in local jails who were eligible for transfer to state prison rested "*exclusively*" on state law. App. C 15. Thus, the relevant "factual" context here is the context of state law concerning these state officials' duties (if any) toward the transfer-eligible inmates in the Harris County jail. While State Defendants maintain they had no duty to remedy unconstitutional conditions in a local jail at the time of the liability finding here, at the very least any such duty was and still is unsettled and not clearly established.

A. State Law Prior to H.B. 93[7] Was Unsettled as to Liability and Financial Responsibility of

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[6] Although not a subject of this petition, State Defendants ask this Court to take judicial notice of the *Alberti* court's Memorandum Opinion and Final Order of September 29, 1992 attached as App. G and H. App. E is an order of the *Alberti* court of March 24, 1993, which renames the anticipatory fines "remedial sanctions." Although not a subject of this petition, State Defendants also request the Court to take judicial notice of this order.

[7] TEX. GEN. & SPECIAL LAWS 1991, 2d Called Sess., Ch. 10, pp. 180-226 (hereafter, "H.B. 93") (eff. August 29, 1991).

State Defendants for Transfer-Eligible Inmates in Harris County Jail.

It is difficult to seriously contend that state law before August of 1991 was settled as to the responsibility (financial or otherwise) of State Defendants for prisoners in local jails. Two sections of the Local Government Code, TEX. LOCAL GOV'T CODE ANN. §§ 351.001 (Vernon Supp. 1993) and 351.041 (Vernon 1988), vest responsibility for county jails in the county commissioners courts and the sheriffs, respectively. Moreover, prior to August of 1991, state statutory law was unequivocal in making the counties financially responsible for all prisoners in their jails:

> "[A] county is liable for all expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county."

TEX. CODE CRIM. PROC. ANN. art. 104.002 (Vernon Supp. 1993); *see* Op.Atty Gen. JM-743 (1987) (counties, not TDC, are liable for medical expenses of parole violator in TDC's legal custody but confined in county jail), App. BB; Op.Atty Gen. JM-730 (1987) (counties, not TDC, liable for medical expenses of TDC inmates confined in county jail on bench warrant), App. CC. In fact, prior to August 1991, the Texas Legislature had on three occasions failed to pass bills to compensate Texas counties for holding convicted felons, as well as a constitutional amendment and accompanying legislation to require the State to reimburse local governments for any new State mandates. See State Defendants' Exhibits 4-8, introduced at the trial of October 22, 1990 and testimony at that trial transcript [tr.] vol. 1, pp. 122-24. Nor, prior to August 1991, had the legislature appropriated money for compensating the counties for holding such prisoners. *See* TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. Ch. 1263, pp. 5184-5200 (eff. June 16, 1989). The lack of appropriations to compensate the counties is evidence of the intent of the legislature, *see Bullock v. Calvert*, 480 S.W.2d 367, 371 (Tex. 1972); TEX. CONST., Art. VIII, § 6 (funds may not

be drawn from the State treasury without a specific appropriation therefor). Under the State constitution, the legislature has plenary power over the counties. *See* TEX. CONST., Art. IX, § 1; *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915, 919-20 (1925); *Bass v. Fontleroy*, 11 Tex. 698, 706 (1854).

While the district court attributed the unconstitutional conditions in the Harris County jail to a failure of TDCJ-ID to meet a state-law duty to accept inmates sentenced to it, *see* App. Y 21, state law is explicit and abundantly clear that the state prison system has a duty to accept inmates "only" pursuant to former Tex. Rev. Civ. Stat. Ann. art. 6166a-4, which requires the Texas Board of Criminal Justice to "develop, adopt and enforce an allocation formula' that allocates admissions to TDCJ-ID.[8] TEX. GOV'T CODE ANN. § 499.121 (Vernon Supp. 1993). In fact, repeatedly the district court ordered the State Defendants to "maintain" the allocation formula, App. U 8, App. V 3, and App. W 3-4.

B. Allocation Formula was Lynchpin of Reforms Aimed at Controlling Local Jail and Prison Overcrowding.

The allocation formula was a component of H.B. 2335, the Comprehensive Criminal Justice Reform Act, TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. Ch. 785, pp. 3471-3558 (generally eff. September 1, 1989). State Defendants have long maintained -- and the legislative history shows -- that H.B. 2335's primary purpose was to establish a system of financial incentives and disincentives directed at controlling front-end popu-

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[8] Former article 6166a-4 is now codified as TEX. GOV'T CODE ANN. § 499.071 (Vernon Supp. 1993), App. Z. The allocation formula regulation that it mandates is codified as Chapter 152 in Title 37 of the Texas Administrative Code (37 TAC §§ 152.1-152.3). App. DD. Under the current formula, Harris County is allocated 20.6961% of total weekly admissions to the state prison. *See* 17 Tex. Reg. 6788 (October 2, 1992).

lation pressures by providing state financing for sentencing alternatives while at the same time forcing local governments to fund the cost of their own transfer-eligible inmates.[9] State Defendants' Exhibit 49, trial of the week of August 14, 1989, the Report of the Texas House Appropriations Subcommittee on Prison Construction Alternatives (January 30, 1989), esp. at 10 (noting that the state of Texas should develop "a hard core bed allocation system for local governments" and "a system to discourage local governments from sending criminals to the hard-core beds owned and operated by the state . . . beyond the allocation system"). Thus, the Report of the *Alberti* Special Master aptly summarized H.B. 2335 by saying at 4 that it "institutionalized the allocation formula, with its explicit cap on admissions to TDCJ, and encouraged the development within the counties of a wide range of both institutional and community based alternatives to incarceration for a broad class of sentenced felons convicted of essentially non-violent offenses."

It must be noted that State Defendants have consistently and persistently maintained that Harris County underutilizes intermediate sanctions and takes a disproportionate number of state prison beds. *See*, trial of week of August 14, 1989, tr. vol.

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[9] Texas has, of course, also maintained an aggressive prison construction program that is almost unprecedented in scope: "Since 1984, the State has brought 22,299 new prison beds on line, 13,270 of them in 1989 and 1990. In 1989, the State further committed itself to the construction of 15,550 more beds. . ." *See* Report of December 13, 1991 by the *Alberti* Special Master on Harris County sentencing practices (hereinafter "Report of *Alberti* Special Master," copies lodged with Clerk of the Court) at 3. In addition, H.B. 93, Sec. 22.03, p. 224, appropriated $672,100,000 for the construction of 25,000 additional beds, and S.B. 171, passed by the 73rd Texas Legislature (eff. February 23, 1993), appropriated $250.8 million, which TDCJ plans to use in part to construct and operate 10,000 "state jail" beds. (See copies of S.B. 171 and State Defendants' Motion to Modify Final Order or, in the Alternative, to Stay the Imposition of Fines, lodged with the Clerk of the Court. State Defendants request the Court to take judicial notice of these documents.) This makes a grand total of 72,849 beds either built or funded for construction since 1984.

3, pp. 534-572.[10] The Report of the *Alberti* Special Master on Harris County's sentencing practices has confirmed this. (*See* copies lodged with the Clerk of the Court.) Especially in light of these facts, State Defendants have contended that the allocation formula should not have been overridden, so that it would have had its natural effect of encouraging the use of sentencing alternatives in Harris County, as the Texas legislature intended.

C. The State District Court Judgment Relied on By the Fifth Circuit Has Been Vacated Without Ever Being Reviewed, Let Alone Affirmed, by a State Appellate Court.

Both the panel and the district court sought to resolve these complex issues of state law by reliance on an act passed in 1989[11] resting "primary responsibility" in TDCJ for the "confinement, supervision and rehabilitation of felons." *Alberti I*, App. C 21. In doing so, the panel noted its reliance on the only state district court to have addressed the issue. *Id.*

However, the state cases[12] raised not only complicated issues of state court jurisdiction and complex factual issues but overarching separation of powers issues under Article II § 1 of the Texas Constitution.[13] Moreover, under state law, because

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[10] *See also* Affidavit of Steve Martin (with summary) concerning the Harris County criminal justice system, admitted into evidence at the trial of February 27, 1990 as part of State Defendants' Exhibit 17 (copies lodged with the clerk of the Court).

[11] Now codified as TEX. GOV'T CODE ANN. § 493.001 (Vernon Supp. 1993).

[12] *County of Nueces v. Texas Board of Corrections*, No. 451,071 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, pending); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis County, 126th Judicial District of Texas, pending). Both of these were decided by the same state district court judge.

[13] State Defendants have lodged with the Clerk of the Court copies of their appellate brief in *Texas Board of Criminal Justice, et al. v. Nueces*

state entities were involved, the state court judgment on appeal (*Nueces County*), was superseded or automatically stayed. *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 481-82 (Tex. 1964). Before the state court case could be argued, let alone decided on appeal, the counties involved, including Harris County, agreed to vacate their judgments and settle pursuant to H.B. 93. App. EE, FF and GG. *No state appellate court, let alone the Texas supreme court, has ever ruled on the state law issues presented to and decided by the Fifth Circuit.* Indeed, plaintiffs recognized the lack of certainty in state law when they vigorously urged certification to the Texas Supreme Court in the Fifth Circuit. See Plaintiffs'-Appellees' Brief in *Alberti v. Sheriff of Harris County v. Richards*, Fifth Cir. Nos. 91-2274, 91-2210, 90-6034, 90-2441 at 65-72. App. HH.

D. The Legislative History of H.B. 93 and State Court Settlements Indicate the State Was Responsible for Prisoner Transfers Only After October 1, 1991.

After intense lobbying by Texas counties, the Texas Legislature in August, 1991 passed H.B. 93, a law which provides for compensation to the counties for housing inmates sentenced to TDCJ-ID at amounts specifically set by the Legislature. TEX. GOV'T CODE ANN. §§ 499.122-125 (Vernon Supp. 1993), App. AA 2-6. Moreover, as of October 1, 1991 a mechanism was established for transferring, at state expense, inmates to other county jails when a county jail has been declared unconstitutionally overcrowded and over 20 percent of its population is made up of inmates awaiting transfer to TDCJ-ID. TEX. GOV'T CODE ANN. § 499.125 (Vernon Supp. 1993) App. AA 4-5. The legislative history of H.B. 93 indicates that an earlier version of H.B. 93 contained a provision that would have allowed compensation for transferred inmates under state law from February 7, 1991, the date of the *Alberti*

County, et al. No. 3-90-282-CV (3rd Court of Appeals-Austin, Texas) (now dismissed).

court's original order. S.B. 24 (introduced in the First Called Session, 1991), unapproved Conference Committee Report, § 14.02, p. 34, proposing Tex. Gov't Code § 499.123(b). *See* App. II. That provision was dropped in H.B. 93, indicating that the Legislature's intent was not to compensate Harris County prior to October 1, 1991. *Smith v. Baldwin*, 611 S.W.2d 611, 616-17 (Tex. 1981).

E. County Had Full Authority and Ability to Provide Remedy to Inmate Class.

It is indisputable that the County had and still has full authority under Texas law to contract with other counties and transfer prisoners out of its jail to detention facilities in those counties. TEX. GOV'T CODE ANN. Ch. 791 (Vernon Pamph. 1993); esp. TEX. GOV'T CODE ANN. § 791.003(3)(A) (Vernon Pamph. 1993); TEX. LOCAL GOV'T CODE §§ 351.031-351.035 (Vernon 1988); Ch. 351, Subch. F & G (Vernon Supp. 1993); *see also* TEX. GOV'T CODE § 511.012(b) & (c) (Vernon 1990). Nor has there been any contention that the County lacked the financial resources to have made the contracts.

REASONS FOR GRANTING THE WRIT

I. THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

A. Certiorari Should Be Granted To Resolve An Irreconcilable Conflict Between The Circuits Over (1) The Role of Federal Courts In Deciding Disputes Between Different Levels of State Government And (2) The Scope of the Eleventh Amendment.

This case arose in the context of an internal political dispute between the Texas legislature and the counties of Texas over whether counties should be compensated for housing

inmates ready for transfer to the state prison system. Prior to the passage of H.B. 93, that debate raged in the Texas legislature, often between representatives of the state's rural and urban counties:

> Without reducing to a disagreement between you and I individually, kind of globally the problem with that is, you have judges in Harris County that are making decisions that raise my taxes, as he indicated earlier. And we've gone to an extensive amount of time and trouble to try to establish this. Harris County has about 19[14] percent of the State's population, produces about 20 percent of the State's tax revenue stream. It consumes 28 to 30 percent of the prison resources.
>
> When your locally elected judge in Harris County makes a decision about what to do with the criminal, in excess of that 20 percent, taxes in Dallas and Bexar and Parker County go up to pay for that decision . . .

Meeting of the Appropriations Committee of the Texas House on February 21, 1991, Remarks by Representative Ric Williamson of Parker County (Weatherford) in colloquy with Representative Paul Hilbert from Harris County (Houston) (transcript of remarks lodged with the Clerk of the Court).

The Fifth Circuit showed no hesitancy to intrude directly into the center of this political dispute, likening its orders to a "lion in the street" when the Texas legislature passed H.B. 93 in August, 1991. App. D 3. And, *after* deciding the "hard questions" of "*exclusively*" state law against Texas, the Fifth Circuit found the state to be a constitutional violator, thereby sidestepping, without discussion, its authority to decide the

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[14] The evidence in this case indicates 16 percent. See Affidavit of Steve Martin (lodged with the clerk of the Court) at 22.

state-law dispute in the first place. App. C 29. This merely begs the question: Did the Fifth Circuit have authority under Article III[15] and principles of federalism to decide a state-law dispute between two state governmental entities?

In contrast to the Fifth Circuit's approach -- headlong into the melee -- the Sixth Circuit has ruled under principles of federalism that federal courts lack authority "to adjudicate an internal dispute between a local governmental entity and the very state that created it." *Kelly v. Metropolitan Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee*, 836 F.2d 986, 998 (6th Cir. 1987), *cert denied*, 487 U.S. 1206 (1988). And, again in contrast to the Fifth Circuit's approach, numerous decisions of this Court and the Circuit courts have ruled that local governmental entities lack standing to bring an action in federal court against their creator.[16]

The reasoning of the Sixth Circuit rests primarily on a prudent and pragmatic deference[17] to state governments in finding their own means of funding a remedy when a constitutional violation occurs:

> Again, however, the existence of a duty to eliminate [the constitutional violation] does not mean that the duty may only be discharged through taxes levied by the state, as opposed to

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[15] If Congress cannot tell a state where to locate her capital, how, under Article III, can a federal court tell a state that it must compensate its counties? *See Coyle v. Smith*, 221 U.S. 559 (1911); *see also Presley v. Etowah County Comm'n*, ___ U.S. ___, 112 S.Ct. 820, 832 (1992).

[16] *E.g., Coleman v. Miller*, 307 U.S. 433, 441 (1939); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984) (and cases cited therein).

[17] State Defendants maintain, of course, that this deference is anchored in the Constitution, including the Tenth and Eleventh Amendments.

> taxes levied by the counties of the state. This "constitutional wrongdoers must pay for their wrongs" argument has little or no force where we are talking about two political entities, a state and one of its subdivisions, each of which has done wrong (as have subdivisions not now before us) and where the men and women representing the electorate of the state as a whole -- an electorate that includes the voters of all subdivisions -- have chosen not to enact legislation shifting to the state as a whole the costs of repairing the wrongs within each subdivision.

Kelly, 836 F.2d at 998. In fact, this Court has traditionally shown great deference to the states in regards to issues that involve statewide systems relating to the fundamental structure of the state's fiscal and taxing policies, public administration and local initiative. *See e.g.*, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40-41 (1973). *Kelly* relied on *Rodriguez* heavily in its reasoning. *Kelly*, *supra* at 996-997.

Yet here, without authoritative state court interpretation, federal courts construed a provision of state law vaguely ascribing "primary responsibility" for felons to TDCJ[18] as carte blanche authority to force state taxpayers to acquire a special prison system for one locality, despite that locality's disproportionate use of state prison space. This federally ordered, but state financed, capacity acquisition required expenditures beyond the funding appropriated by the Texas legislature for construction and acquisition of prison capacity. This is simply not the office of federal courts:

> Such fundamental decisions as how many prisons to build and how large to build them -- basic decisions regarding the allocation of public

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[18] Now codified as TEX. GOV'T CODE ANN. § 493.001 (Vernon Supp. 1993).

> resources are simply outside the domain of federal courts.

Inmates of Occoquan v. Barry, 844 F.2d 828, 843 (D.C. Cir. 1988).

Similarly, the Fifth Circuit's willingness to enter into the fray and decide "hard questions" of "*exclusively*" state law against the State Defendants led it to conclude that the money payments to the County were incidental to injunctive relief. App. C 29. Bootstrapping again its state law decision, it sought to distinguish *Kelly* by ruling that the state was a "current constitutional violator." App. C 29. But as noted above, this distinction begs the question. *Kelly* rests primarily on the proposition that it is not the province of federal courts to decide at all a state-law dispute between different state subdivisions, which the Fifth Circuit here necessarily had to decide first in order to conclude that the State is a "current constitutional violator." Rather, relying on *Rodriguez*, *Kelly* would leave such matters to the state political process, *Kelly*, *supra* at 996-997, and not engage in an "'end-run around the . . . legislature's allocation of state funds'." *Kelly*, *supra* at 995 *citing United States v. Texas Education Agency*, 790 F.2d 1262, 1265 (5th Cir. 1986), *cert. denied sub nom. Lubbock I.S.D. v. Texas Edcuation Agency*, 479 U.S. 1030 (1987).

Accordingly, *Kelly* found, under Eleventh Amendment analysis, that "[t]he order to pay is ancillary only to itself," *Kelly*, *supra* at 992, and, as such, violated settled precedents holding that, "[w]hen the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Kelly*, *supra* at 988-89 citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984). This in turn is consistent with long-standing case law counseling, under Eleventh Amendment analysis, non-

interference with the fiscal affairs of states. *See e.g., Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946).

The reasoning of the *Kelly* case applies with particular force where, as here, vindication of the constitutional rights of the Plaintiffs could have been achieved without involving the state at all, while leaving the local governmental entity free to pursue its relief before the state legislature or in state court.

> It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states. "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that *such relief should be denied in every case where the asserted federal right may be preserved without it."*

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943), *quoting Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). (emphasis added)

Especially in an era of tightening budgets, the role of federal courts in resolving fiscal disputes between different levels of state government raises fundamental questions of federalism. Hence, the irreconcilable conflict between the Fifth Circuit and other circuits as to how to approach this problem is important, and this Court should resolve it.

B. Certiorari Should Be Granted Because of The Lower Court's Clearly Erroneous And Ill-Reasoned Ruling on Abstention and Certification.

1. Abstention Was Especially Appropriate Because of Ongoing State Court Proceedings Dealing With Undecided Issues of State Law.

Few cases cry out so much as this one for some principled discussion of federalism, particularly this Court's decision in *Railroad Commission v. Pullman*, 312 U.S. 496 (1941). Although acknowledging that this case presented a "hard question" of "*exclusively*" state law, App. C 15, the panel was simply flat-footed on abstention, noting only that it did not "quite fit", App. C 30, despite this Court's clear message that such stingy judicial "pigeonholing" is not appropriate in abstention analysis. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987). Judge Higginbotham, no novice at federalism, has himself noted, in a case which formed the gravamen of his analysis here, that if there is "real ambiguity" about statutory intent or state law, "strong" grounds for *Pullman* abstention exist. *Bush v. Viterna*, 795 F.2d 1203, 1205 n.1 (5th Cir. 1986).

There can be little question, especially in light of H.B. 2335 and the allocation formula, that at the very least there was "real ambiguity" as to whether or not the intent of state law was for TDCJ-ID or other state entities to assume responsibility for transfer-eligible inmates in local jails prior to the passage of H.B. 93. Certainly, given the stakes of the state law dispute in terms of the state's criminal justice policies, its relationship with its counties[19] and the obvious fiscal implications for the state,

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[19] Even assuming *arguendo* federal courts have authority to resolve a state law dispute between two state governmental entities, abstention would still seem the better course. Deference to state institutions is especially appropriate, "when it is proposed that the remedial powers of the federal courts be exercised 'to restructure the operation of local and state governmental entities.'" *Kelley*, 836 F.2d at 1000, *citing Hills v. Gautreaux*, 425 U.S. 284, 293, (1976). *See also Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs").

abstention under *Pullman* was appropriate.[20]

The argument for abstention is especially compelling in light of the pendency of a state court action involving the identical state and county parties. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Younger v. Harris*, 401 U.S. 37 (1971). In fact, "wise judicial administration" would have counseled in favor of dismissing State Defendants to conserve the resources of the courts and the parties. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976).

The Fifth Circuit's "deference" to these ongoing state court proceedings and the district court's "contingent" enforcement of its orders, *see* App. C 21-22, U 7, are a far cry from the considerations of federalism embodied in the abstention doctrine. Here those state court proceedings had either been "superseded" or stayed on appeal[21] (as in *County of Nueces*) or had not even been fully litigated in the trial court. Litigants should not be able to use a federal court to make an end run around normal state judicial processes. *See Pennzoil*, 481 U.S. esp. at 13-14. Nor should they disrupt the ordinary process of trial or appeal in state court by adjudicating a civil rights case in which the federal

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[20] Because this is a Texas case, the proper course was to dismiss State Defendants or at least any claims relating to State Defendants' liability and financial responsibility for transfer-eligible inmates in the Harris County jail. *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 88-89 (1975).

[21] The basis for the automatic stay on appeal was precisely because the judgment was against a state entity and issues of sovereign immunity were implicated. *Ammex*, 381 S.W.2d at 481-82. Given this Court's decision in *Pennhurst*, it would have seemed particularly advisable under the Eleventh Amendment to have deferred to the normal state practice set forth in *Ammex*. *Cf. Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989) (considerations based on the Eleventh Amendment can be applied in other contexts involving the constitutional balance between states and the federal government). Non-interference with the stay and normal state court process was also mandated by 28 U.S.C. § 2283.

constitutional claims are "inextricably intertwined with the state court's grant or denial of relief." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-84 n.16 (1983).

Moreover, the whole idea of "contingent" liability raises the very justiciability problem which the *Pullman* doctrine was designed to avoid:

> When federal courts interpret state statutes in a way that raises federal constitutional questions, "a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless."

Pennzoil, 481 U.S. at 11, *citing Moore v. Sims*, 442 U.S. 415, 428 (1979). And here that prophecy has been sadly fulfilled, for the entire state-law basis of the Fifth Circuit's opinion has evaporated with the vacation of the judgments in state court pursuant to the settlement of the state court actions under H.B. 93.

2. Abstention was Appropriate to Avoid Disruption of State Regulatory Programs.

The lower courts' assumption of jurisdiction over the claims against State Defendants also violated the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), which calls for abstention when such jurisdiction interferes with a complex state regulatory scheme. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. at 814 (federal courts must abstain to avoid adjudication that would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").

Requiring State Defendants to finance the housing of transfer-eligible inmates in other counties implicated (and, in fact, undermined), the important public policy objectives of the allocation formula under H.B. 2335 by *de facto* giving Harris County additional numbers above its current allocation.[22] It also went at cross-purposes to the manifest intent of H.B. 2335 to encourage the use of intermediate sanctions and alternatives to incarceration because it removed from Harris County the financial burden of supporting inmates sentenced to state prison in excess of Harris County's allocation.[23]

In fact, the entire process of federal review in this case involves consideration of a wide variety of public policy decisions in the Texas criminal justice system which are discretionary in nature. These include (but are not limited to) how many prison beds to construct, how many to contract for, how much good time to award (either under the Prison [or Population] Management Act [PMA],[24] or by prison officials), or how many

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[22] The allocation formula is, of course, subject to state court judicial review under the Texas Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a § 12 (Vernon Pamph. 1993).

[23] In addition, requiring State Defendants to pay the costs of contracts with private vendors or counties for jail space interfered with or superseded the bidding process for such contracts required by TEX. GOV'T CODE § 495.003 (Vernon Supp. 1993).

Moreover, the order circumvented the 1987 Appropriations Act which limited the number of beds that the State could contract out for under former article 6166g-2 (Vernon's Texas Civil Statutes) to 2,000. TEX. GEN. & SPECIAL LAWS 1987, 2d Called Sess., Ch. 78, paragraph 49, p. 343 (eff. August 6, 1987). Before H.B. 93, there were no additional appropriations to allow the TDCJ-ID to contract out for more beds, nor any change in the 1987 rider limiting the number of beds. And as the testimony showed at the hearing in this case of the week of August 14, 1989, TDCJ-ID had already contracted out for all 2,000 beds. See tr. vol 4, pp. 674 & 746.

[24] TEX. GOV'T CODE ANN. Ch. 499, Subch. B (Vernon Supp. 1993). The PMA was itself the subject of a state constitutional attack in Texas courts. *See* Appellants' Brief in *County of Nueces* case (lodged with the Clerk of the Court) at pp. 37-38.

inmates to furlough. These discretionary decisions were all the subject of state court review in both the *Nueces* and *Harris* county actions. And all of these functions and decisions implicate matters of substantial public concern and involve an attempt to maintain a coherent, state-wide criminal justice policy. Federal courts, accordingly, should have refrained from reviewing these issues under a hybrid *Burford-Younger* type of abstention. *Cf. Pennzoil*, 481 U.S. at 11-12 and 15-17 (justifying abstention in light of Art. I, § 13 of the Texas Constitution, the "open courts" provision).

3. If Abstention Was Not Appropriate, the Fifth Circuit Should Have Stayed Further Action Against State Defendants While Certifying the Relevant Questions of Law to the Texas Supreme Court.

Certainly, if abstention for some reason was not appropriate, the Fifth Circuit should have certified the relevant questions concerning the State's liabilities and financial responsibility to the Texas Supreme Court in accordance with TEX. R. APP. P. 114. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (certification appropriate in light of the "great unsettlement" of state law). Certification may also be the most appropriate course now to resolve any remaining dispute about the respective duties of the state and county actors, in light of the settlement of the state court lawsuits and the accompanying changes in state law. *See State of Louisiana ex rel. Guste v. Roemer*, 949 F.2d 145 (5th Cir. 1991) (certifying to Louisiana supreme court question relating to dispute between Governor and Attorney General over who had authority and responsibility to represent state in litigation concerning higher education system). While these State Defendants cannot be held liable for the alleged past actions or omissions at issue here, given the uncertainty of their responsibilities under state law (see *infra* at 26-28), certification would serve to clarify once and for all the respective present and future duties of the state and county

actors. If any of those actors then failed to fulfill their duties, the plaintiffs would be entitled to pursue a remedy against them.

C. Certiorari Should Be Granted To Determine Whether State Officials Can Be Found Liable For Conditions In A Local Jail Under *Wilson v. Seiter* When Their Responsibilities Under State Law For Inmates in A Local Jail Are Not Clearly Established.

Relying on individual liability cases, the Court in *Wilson v. Seiter* mandated an "inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." *Seiter*, ___ U.S. at ___, 111 S. Ct. at 2324. Here, the threshold question of which official, state or county, was responsible for conditions in the local jail presented a "hard question" of "*exclusively*" state law. App. C 15 (emphasis in original). The panel correctly ruled that under Texas law "[t]he county clearly has some responsibility for conditions in the county's jails."[25] *Id.* It then went on to resolve the "hard question" of the liability of state officials on a "tentative" and "contingent" basis, pending the outcome of state court litigation. However, it is difficult to square the Court's reasoning with the requirement of a mental element under *Wilson v. Seiter*. If state law presented a "hard question" as to the responsibility of the state officials sued here for conditions in the local jail, those officials could certainly in good faith maintain the position that they had no such responsibility. Maintaining a defensible legal position on a "hard question" of state law shows no evidence of the culpable mental state required under *Seiter*.[26]

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[25] As previously noted, the County had full authority and ability to provide a remedy to the inmate class in the Harris County Jail. *See supra* at 15.

[26] State Defendants maintain that given their overriding concern for public safety and the prevention of early releases, their obligations to other counties in Texas to take their fair share of inmates under the allocation formula and the requirements of *Ruiz v. Collins* [state prison conditions case, see *supra* at 7 n.3, they should be held to the standard of "malicious or

This can clearly be seen through analogy to the law of individual immunities. State officials sued in their individual capacity cannot be held liable unless their duties were "clearly established" or readily "apparent." *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *also Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Certainly under *Seiter* the principles applicable to good faith immunity in an individual liability case are analogous to the analysis of whether officials have been "deliberately indifferent" or "malicious and sadistic" in a prison conditions case. In this connection, this Court clearly relied on *Estelle v. Gamble*, 429 U.S. 97 (1976); *Whitley v. Albers*, 475 U.S. 312, 317 (1986); and *LaFaut v. Smith*, 834 F.2d 389, 395 (4th Cir. 1987) individual liability cases, in formulating the "culpable mental state" requirement of *Seiter*. *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2323, 2326-27. Moreover, only weeks ago, this Court analogized directly to cases allowing interlocutory appeals for claims of individual immunity in ruling that "the same rationale ought to apply to claims of Eleventh Amendment immunity made by the States and state entities possessing a claim to share in that immunity. . ." *P. R. Aqueduct & Sewer Authority v. Metcalf & Eddy*, ___U.S. at ___, 113 S.Ct. at 687.

State Defendants, of course, are not contending that state officials are entitled to individual immunities when sued in their official capacity. *Hafer v. Melo*, ___ U.S. ___, 112 S.Ct. 358, 362 (1991). *Hafer* made it clear that "the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." *Hafer*, ___ U.S. at ___, 112 S.Ct. at 362.

On the other hand, State Defendants do maintain that state officials acting in their official capacity should be entitled,

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sadistic" intent under *Seiter*. *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. However, under whatever standard imposed under *Seiter*, State Defendants cannot be liable when their underlying state law duties are not clearly established.

as *an incident of the State's Eleventh Amendment immunity*, to a rule assuring them that any *state law* duties which a federal court might construe in the context of a civil rights claim will be clearly established. Otherwise, a federal court could improperly interpret state law and wrongly intrude into state structures and fiscal policy. Hence, especially when state law is unclear, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106.[27]

State Defendants maintain that by analogy to *Harlow* and *Creighton*, and especially in light of *Pennhurst*, until State courts had authoritatively construed their State-law duties, they were entitled to stand on their defense in federal court that they had no duty to inspect the Harris County jail and no duty to fix it. And with the vacation of the State court judgments pursuant to H.B. 93, no Texas district court, let alone an appellate court or the Texas supreme court, has entered a final judgment ruling otherwise. Particularly under these circumstances, it is inappropriate for federal courts to construe unsettled state law, *cf. Pennhurst*, 465 U.S. at 106, let alone rule that state officials were deliberately indifferent to any alleged state law duties.

Because this case involves core fiscal issues in the Texas criminal justice system, the scope of the intrusion on the State of Texas' basic structures and institutions in itself clearly warrants *certiorari*, under fundamental principles of federalism. And because this case arises in the context of jail overcrowding, an area of pervasive litigation in the nation, resolution of the fundamental questions in interpreting *Seiter* presented by this

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[27] These arguments are especially compelling when, as here, there is no state law vesting direct supervisory responsibility in these state officials for conditions in local jails. Absent a showing of direct supervisory responsibility over local jails, state officials should not be held liable for conditions in those jails. *See Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976); *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986) (Texas state officials who set standards for and inspect local jails held not responsible for conditions in local jail).

petition will benefit litigants far beyond the immediate parties to this case.

CONCLUSION

For these reasons, Petitioners request that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ATTORNEYS FOR
PETITIONERS

92-1648

FILED
APR 12 1993

No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

Ann Richards, Governor of Texas; Carol S. Vance, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Clarence N. Stevenson, Allan B. Polunsky, R. H. Duncan, Sr., Gilberto Hinojosa, John R. Ward, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Appendices A-T

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2946

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs-Appellees,

versus

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.,

Defendants-Third Party
Plaintiffs-Appellees,

versus

ANN RICHARDS, THE GOVERNOR OF THE
STATE OF TEXAS, ET AL.,

Defendants-Third Party
Defendants-Appellants

No. 91-2996

IN RE: GOVERNOR ANN RICHARDS, ET AL.,

Petitioners.

No. 91-6062

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs-Appellees,

versus

THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.,

Defendants-Third Party Plaintiffs,
Appellees-Cross Appellants,

versus

ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.,

Third Party Defendants,
Appellants-Cross Appellees.

No. 91-6206

LAWRENCE R. ALBERTI, et al.

Plaintiff-Appellees,

versus

THE SHERIFF OF HARRIS COUNTY, ET AL.,

Defendants-Third Party
Plaintiffs-Appellees,

versus

ANN RICHARDS, THE GOVERNOR
OF TEXAS, ET AL.,

Defendants-Third Party

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, HIGGINBOTHAM, and DUHÉ, Circuit Judges.
PER CURIAM:

I

In *Alberti I*, 937 F.2d 984 (5th Cir. 1991), we affirmed virtually all of the rulings by the district court except we remanded for findings required by the Supreme Court's intervening decision in *Wilson v. Seiter*, — U. S. ----, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991). We remanded to allow the district court to find whether the state and county had acted with deliberate indifference. *Alberti I*, 937 F.2d at 1000. We left to the judgment of the district court whether additional hearings or evidence was necessary. *Id.*

The district court did not hold hearings but found on the basis of the record evidence that the state and the county acted with deliberate indifference to the constitutional rights of felons in the Harris County jail.

II

The state's arguments repeat many earlier made. The county presents more difficult questions.

[1] In *Alberti I* we observed that there was "strong if not compelling evidence of deliberate indifference to the plight of these ready-felons." 937 F.2d at 999.[1] Nonetheless, the state

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[1] The State points out that our prior statements regarding the officials' deliberate indifference are not the law of the case because they were dicta in the earlier decision. Nonetheless, I think it is unlikely that the State can

argues that the finding of deliberate indifference is clearly erroneous. The state suggests that it is not chargeable with knowledge of the jail conditions. The record, however, demonstrates that the state knew that by refusing to accept felons it was causing severe overcrowding in Harris County jails.

[2, 3] The state's second argument denies liability because its officers had a good faith, objectively reasonable belief that the state owed county prisoners no duty. The state relies upon principles of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), and its requirement that the law be "clearly established at the time an action occurred." As plaintiffs point out, this doctrine is applicable only as a defense to the individual liability of persons. *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). The state enjoys no protection from any qualified immunity of a state official.

The closely related argument that given the asserted legal uncertainty of state duty it could not be found to have acted with deliberate indifference has more force. The state points to uncertainty of state responsibility for the care of felons in the county jail in light of rulings by the *Ruiz* court and legislation proposed by the Texas legislature; both signaled that prisoners who are ready for transfer to TDC remain the responsibility of the county until their transfer to TDC. We are not persuaded. The state elected to refuse felons to solve its own problems of overcrowding. We are not persuaded that the state's duty was so uncertain, as we explained in *Alberti I.*

The state also asserts that we should apply the higher standard of "malicious or sadistic intent." In *Seiter*, the Supreme Court held that the level of intent required to constitute cruel and unusual punishment depends upon the constraints facing the official. As examples, the Court contrasted actions responding to a prison disturbance, which must be taken quickly, under

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change the mind of this exact same panel a little over a year later about the probability that they were deliberately indifferent.

pressure, and with concern for compelling safety concerns with the provision of medical care to prisoners which "does not ordinarily clash with other equally important governmental responsibilities." We read *Seiter* to hold that the constraints imposed on the officer which justify the "malicious and sadistic" standard must at least be of an emergency or immediate nature.

[4] The state argues that it could not relieve overcrowding because the legislature would not appropriate more funds for prison expansion and it was constrained by concern for public safety inherent in early release of felons. Justice Scalia's opinion in *Seiter* leaves open how difficulty in funding might negate the intent requirement. In *Alberti I*, we noted that "before *Seiter*, it was well established to this circuit that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." 937 F.2d at 999, citing *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980). How the Supreme Court will develop the "funding" defense to eighth amendment violations is not certain. Regardless, the evidence that an absence of funding made the state unable to accept the convicted felons is equivocal. Indeed, the state has at earlier times pointed to the *Ruiz* decree's setting of population levels as the culprit. But as we explained in *Alberti I*, that decree was no barrier to the state's constitutional duty. The concern about the release of felons is the flip-side of the inadequate funding argument: if the state would simply expand its prison facilities, no excess release of prisoners would be necessary. We find no error in the finding by the district court that the state was deliberately indifferent and find no occasion for further exploring the "funding" defense.

[5] The district court's conclusion that the county was deliberately indifferent to the unconstitutional conditions in its jail is not so easy. The record is mixed. There is evidence of "arguably formidable constraints" facing the county including the dramatic increase in the number of state ready-felons being kept in the county jail, largely beyond the county's control to prevent.

Nonetheless, the district court found that the jails would exceed "constitutional capacity" with all ready-felons removed.

Whether county efforts to relieve overcrowding were sufficient to avoid a finding of deliberate indifference is a close case. The county can point to several things it did to reduce the jail population. Some of these were successful; some were not through the failure of other participants in the legal system to do their part. For example, the county encouraged local judges to use pretrial release for certain low-risk offenders, but the Special Master found that the judges were reluctant to do so. On the other hand, the county has continued to operate the jail over its constitutional capacity for some time. As we indicated in *Alberti I*, "[w]hile the huge jump in the population of ready-felons might weigh against a finding of deliberate indifference, other facts could weigh in favor of such a finding." 937 F.2d at 1000. The district judge was intimately familiar with the push and shove of state government and its response to sorry prison conditions. This trial judge was uniquely informed of the county "mental state" and we decline to upset it. In short, the district court's finding of deliberate indifference is not clearly erroneous.

[6] The county defendants assert problems with the remedies imposed against them by the district court. We declined to address the remedial issues in *Alberti I*. The main argument seems to be that the district court abused its discretion by imposing a cap on the jail population. The county defendants argue that this is the most intrusive remedy and therefore an abuse of discretion. *Ruiz v. Estelle*, 679 F.2d 1115, 1144 (5th Cir. 1982). A numerical cap on the number of prisoners is not an overly intrusive remedy. It gives the county maximum flexibility in determining on its own how to meet the population goals. The remaining contentions are without merit.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2946, 91-2996, 91-6062, 91-6206

Lawrence R. ALBERTI, et al., Plaintiffs,
v.
The SHERIFF OF HARRIS COUNTY,
TEXAS, et al.,

Defendants-Third Party,
Plaintiffs-Appellees,
v.
Ann RICHARDS, the Governor of the
State of Texas, et al., Defendants-Third
Party Defendants-Appellants.

In re Governor Ann RICHARDS,
et al., Petitioners.

Lawrence R. Alberti, et al.
Plaintiffs-Appellees
v.
The SHERIFF OF HARRIS COUNTY
TEXAS, et al.
Defendants-Third Party Plaintiffs,
Appellees-Cross Appellants
v.
Ann RICHARDS, the Governor of Texas,
Third Party Defendants,
Appellants-Cross Appellee.

Lawrence R. ALBERTI

Plaintiff,

v.

The SHERIFF OF HARRIS COUNTY, et al.

Defendants-Third Party
Plaintiffs-Appellees,

v.

Ann RICHARDS, the Governor of Texas, et al.

Defendants-Third Party
Defendants Appellants.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 20, 1992, 5 Cir., ____, ____ F.2d ____)

(January 13, 1993)

Before REAVLEY, HIGGINBOTHAM, and DUHE', Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick S. Higginbotham
United States Circuit Judge

APPENDIX C

Lawrence R. ALBERTI, et al.,
Plaintiffs-Appellees,

v.

The SHERIFF OF HARRIS COUNTY,
TEXAS et al.,
Defendants-Third Party
Plaintiffs-Appellants, Appellees,

In re Ann RICHARDS,
the Governor of Texas, et al.,
Third Party Defendants-Appellants.

Nos. 90-2441, 90-6034, 91-2274 and 91-2801.

United States Court of Appeals,
Fifth Circuit.
July 25, 1991.

Before REAVLEY, HIGGINBOTHAM, and DUHÉ, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is another chapter in the now epic struggle of Texas with its bulging prisons. The reality is that the colloquial expression "state pen" has often been apt. Harris County, Texas, after many years of federal prodding, brought its jails into substantial compliance with constitutional standards. County jails in Texas house both county and state prisoners. A substantial portion of a county's jail population consists of prisoners destined for the state prison system. The struggle of Harris County for an adequate jail system was frustrated by the state's refusal to take its state prisoners. This delay served state penalogical goals, but its resulting success at the state level came out of the hide of Harris County. Judge DeAnda of Houston and Judge Justice of Tyler have commendably presided over this intricate fracas, and we find today no errors in their effort. We are compelled to remand findings of county and state liability due to an intervening decision of the United Sates Supreme Court. We do so despite compelling evidence of state liability, and some

evidence of county liability, only because the requisite fact-findings required by the new law were understandably not made and we decline to exceed our appellate role by supplying the findings.

I.

A. *Procedural background.*

It will soon be twenty years since Lawrence Alberti and his fellow prisoners filed a class action on behalf of past, present, and future inmates of Harris County jails. The complaint named members of the Harris County Commissioners Court and the Harris County Sheriff's Department as defendants and, pursuant to 42 U.S.C. § 1983, alleged that the jails' conditions violated numerous constitutional and statutory provisions.

The original district judge, Judge Bue, conducted extensive hearings, including visits to the facilities. He concluded that conditions in the jails were "inhumane." The plaintiffs and the county then entered into a consent decree on February 4, 1975. The decree called for renovations of existing facilities, the development of a new central jail, and improvements in staff and security. The district court retained jurisdiction to issue further interim orders, and shortly thereafter, on December 16, 1975, the court issued a lengthy opinion setting forth broad guidelines for the streamlining of the criminal justice system, the implementation of an effective pre-trial release program, and the improvement of living conditions within the jails.

At the time of the decree, the county's facilities consisted of a central jail, with a design capacity of 1150, at 301 San Jacinto and a detention center, with a design capacity of 810, in Humble, Texas. In 1982, spurred by the consent decree and later remedial orders, the county completed a new central jail, with a design capacity of 3505, at 1301 Franklin and closed the old central jail. Attendant staffing and supervision concerns were the subject of several additional orders by the *Alberti* court. *See Alberti v. Klevenhagen*, 606 F.Supp. 478 (S.D.Tex. 1985); *Alberti v. Heard*, 600 F.Supp. 443 (S.D.Tex. 1984). The county also commissioned an expert, Dr. Charles Friel, to consider future needs. Pursuant to his projections, the county authorized the construction of a third jail facility, with a capacity of 4000, at 701 North San Jacinto and the renovation of the old central jail, to house 400, at 301 San Jacinto.

The county filed a motion for final judgment and permanent injunction on February 20, 1987. Shortly thereafter, on April 28, 1987, the *Alberti* court appointed three monitors--a special master, a medical monitor-assessor, and a jail monitor-assessor--to periodically inspect the jails and to assess their conditions, to make findings on the county's compliance with its orders, and to determine the maximum capacities of the jails. *See Alberti v. Klevenhagen*, 660 F.Supp. 605 (S.D.Tex. 1987). The monitors issued their first report on October 7, 1987. Of the eighteen conditions surveyed, the monitors found full compliance as to nine, partial compliance as to seven, and non-compliance only as to two, medical and dental care and drug and alcohol treatment. The monitors also found that, as of June 1, 1987, the county's fails were only five percent over their design capacity. However, in light of the inordinate delay in achieving substantial compliance, the monitors recommended continued supervision by the *Alberti* court.

B. *The state's scheduled admissions policy.*

The state of Texas has been beset with its own overcrowding problems. In 1985, after many years of litigation in *Ruiz v. Estelle*, the state entered into a "crowding stipulation," agreeing to limit the population in its prisons to 95% of capacity. *See Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987). To stay within the limits, the state periodically closed its prisons to convicted felons sentenced to the state's prison system, and ready for transfer, but awaiting transfer in county jails. In September of 1987, the state attempted to order the rationing with a "scheduled admissions policy," setting daily quotas on the number of ready-felons that it would accept into its prison system from each county.

As stated by the monitors, "[t]he painful consequences for Harris County of this new admissions policy quickly became evident." A backlog of ready-felons developed, and on December 17, 1987, the *Alberti* court directed the monitors to reassess the jails' conditions in light of the state's new policy. The monitors issued their report on March 21, 1988. They found that the jails were "clean, well-run, and reasonably safe and secure," but warned of the potential consequences of the state's scheduled admissions policy:

What this quota policy means for the defendants is obvious. Over the preceding years, the number of convicted felons in

Harris County facilities awaiting transfer to the TDC fluctuated regularly between 100 and 200. By the end of September, 1988 [sic], that number was up to 512; by December 31, 1987, the number stood at 798. Even more alarming than the growth itself is the likelihood that it will continue at about the same rate for the foreseeable future. . . . Harris County is, in effect, operating an 800-bed facility for TDC, by March or April, they may be operating the equivalent of a 1,000 bed facility.

By September of 1988, the monitors' dire forecast was realized. In their fourth report, issued on September 12, 1988, the monitors found that the jails' population increased from 4576 in January of 1988 to 5650 in July of 1988, or thirty percent over design capacity. The monitors concluded that the jails were dangerously overcrowded:

> All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care, and mental health services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

The monitors further concluded that the appropriate capacities of the central jail at 1301 Franklin and the detention center in Humble were 3330 and 770 respectively, or 95% of design capacity. They recommended that the *Alberti* court direct the county and state to immediately reduce the jails' population to 120% of design capacity (4200 at the central jail and 970 in the detention center) and also set future population caps at 110% of design capacity upon the completion of the renovation of the old central jail at 301 San Jacinto and 95% of design capacity upon the completion of the new facility at 701 San Jacinto.

On November 8, 1988, on the basis of the monitors' report, the *Alberti* court *sua sponte* directed the county sheriff to transport and deliver to the Texas Department of Corrections (later the Texas Department of Criminal Justice--Institutional Division) at least 290 ready-felons each week beginning December 5, 1988. The court reasoned that, under Texas law, "the TDC, not Sheriff Klevenhagen or the Harris County Commissioner's Court, is responsible for housing persons who have been convicted of

felony offenses in the State criminal courts." In support of this conclusion, the court cited Tex. Penal Code §§ 12.32-12.34, Tex.Code Crim.Proc. Art. 42.09 § 2, and Tex.Rev.Civ.State. Art. 6166r (now Tex.Gov.. Code § 499.006). The state, however, refused to accept ready-felons above the quota allocated to the county in its scheduled admissions policy, leaving the county unable to comply with the order.

By December of 1988, the population of ready-felons in the county's jails leaped to over 2100, representing more than a third of the jails' population. On December 12, 1988, the county moved the *Alberti* court to require the plaintiffs to join state officials as additional defendants, urging that it could not achieve constitutional compliance without the participation of the state. The *Alberti* court denied the motion on January 12, 1989, but allowed the county to file a third-party complaint against the state. In the third-party complaint, the county prayed that the court enjoin the state to immediately remove all ready-felons from its jails, the county sought no monetary damages.

The state moved to dismiss the county's third-party complaint and, alternatively, for the joinder of all Texas counties and all ready-felons backlogged in Texas county jails. The state also moved to dismiss for lack of venue, to transfer venue, and to stay the *Alberti* proceedings pending an application to the judicial panel on multidistrict litigation. On May 12, 1989, the *Alberti* court denied the motion, reasoning that the state had a state law duty to "speedily" accept ready-felons and a federal constitutional duty not to impose cruel and unusual punishment on felons. *See* Tex.Rev.Civ.State. Art. 6166r (now Tex.Gov. Code § 499.006). If the state violated the latter constitutional duty, continued the court, then *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), would not bar an order compelling compliance with constitutional standards. The court also denied the venue arguments, concluded that *Ruiz* was no bar to the third-party complaint, refused to abstain, and found the joinder of all other Texas counties unnecessary.

C. *The In re Clements bifurcation.*

On May 30, 1989, the plaintiffs moved the *Alberti* court to transfer to the *Ruiz* court their pending motions for a population cap on the county's jails and the county's motion for an order directing the state to remove ready-felons from its jails. The

state joined the request that the third-party complaint be transferred to the *Ruiz* court.

Meanwhile, on June 26, 1989, the state moved the *Alberti* court to reconsider its May 12 order in light of a recently enacted statute, H.B. 2335, Tex.Gen. & Special Law 1989, Reg.Sess., Ch. 785, effective September 1, 1989. H.B. 2335 made a number of changes in the state's criminal justice system. Most relevant to this appeal, H.B. 2335 created the Texas Board of Criminal Justice as a replacement for the Texas Department of Criminal Justice, deleted the word "speedy" from Tex.Gov.Code § 409.006, and authorized the adoption of the scheduled admissions policy. Alternatively, the state moved the *Alberti* court to transfer the third-party complaint to the *Ruiz* court; the state objected, however, to the transfer of the plaintiffs' pending motions.

The *Alberti* court denied both the requests for transfer and the motion to reconsider on July 10, 1989. The court reasoned that the transfer was not required by this court's *en banc* decision in *Gillespie v. Crawford*, 858 F.2d 1101 (5th Cir. 1988), nor would it advance the purposes of *Gillespie*. As to the adoption of H.B. 2335, the court stated:

[t]he fact that Third-Party Defendants may no longer have a state-law duty to 'speedily' accept convicted felons contrary to their admissions allocation formula does *not* abate their federal Constitutional duties toward these felons. . . . Third-Party Defendants' federal Constitutional duty to not impose cruel and unusual punishment upon convicted felons remains, regardless of the actual location of the felons' confinement.

The plaintiffs and the state then petitioned for a writ of mandamus from this court. We granted the writ in part on August 11, 1989, transferring to the *Ruiz* court

> so much of the *relief* portion of the third-party complaint as seeks an injunction ordering our individual petitioners (in their official capacities) to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities.

In re Clements, 881 F.2d 145 (5th Cir. 1989).

D. *The bench trial.*

The population of ready-felons in the county's jails continued to escalate, and by March of 1989, the jails' total population exceeded 7200, forcing 2700 prisoners to sleep on the floors each night. As stated by the monitors, "[t]o put this into some perspective, Harris County now has more prisoners sleeping on the floors of its detention facilities than the total number of convicted offenders incarcerated in each of fourteen states." In light of the increase in total population, the monitors revised their recommendations in a report issued on April 11, 1989. They suggested that the *Alberti* court direct the county and state to reduce the jails' population to 7000 (6000 in the central jail and 1000 in the detention center) within 30 days, 6400 (5500 in the central jail and 900 in the detention center) within 90 days, 5800 (4990 in the central jail and 810 in the detention center) within 180 days, and 5200 (4390 in the central jail and 810 in the detention center) within 270 days. They further suggested that the *Alberti* court set a final population cap of 8732, equal to design capacity, upon completion of the new facility at 701 San Jacinto. In a report issued the following month, on June 1, 1989, the monitors concluded that "living conditions for inmates . . . have become intolerable, shocking to the conscience and unequivocally unconstitutional."

The *Alberti* court held a "merits-liability" bench trial August 14 through 18, 1989. By the time of the trial, the total population in the county's jails stood at 8086, or 188% of design capacity, with ready-felons, then a population of 3420, representing 45% of the total population. A parade of witnesses testified to the ill effects of the overcrowding. The lead special master, J. Michael Keating, described "much attenuated protection" because of inadequate staff, inadequate ventilation and food service, supply shortages, precarious fire safety, and a medical care system on the verge of collapse. The captain of the central jail, Don McWilliams, concurred with Keating's assessment and, in addition, testified to "a spectacular increase in the incidence of disciplinary infraction."

The *Alberti* court held an additional hearing on the plaintiffs' requests for supplemental relief September 12 through 15, 1989. At the hearing, the court expressed its concern that the county's joinder of the state as a third-party defendant could suffer jurisdictional defects under *Pennhurst*. Upon the court's

suggestion, the plaintiffs sought leave to file a supplemental complaint against the state on September 15, 1989.

The *Alberti* court issued its findings of fact and conclusions of law on September 25, 1989. The court opened its opinion by granting the plaintiffs' motion for leave to file the supplemental complaint. It found that the conditions in the jails were "cruel and unusual," citing extreme overcrowding as "the primary cause" of the constitutional violation. More specifically, the court found that 2800-2900 prisoners slept on the floor each night, forming a "human carpet" in some cellblocks, that the staff was inadequate to assure the safety of all prisoners, that there had been a great increase in disciplinary violations, that there were problems with plumbing and ventilation, that fire safety was "severely compromised," that supplies and food service were inadequate, that medical care conditions reflected "conscious indifference towards the inmates' serious medical needs," and that county judges gave greater weight to pre-trial release recommendations than state judges.

The *Alberti* court concluded that the county was liable for the violation because, under Texas law, its sheriff and commissioners court were keepers of the jails. Tex.Local Govt. Code §§ 351.001-351.015 and 351.041-351.042. The court further found the state jointly liable because, under Texas law, it had the "primary responsibility" for convicted felons. Tex. Rev. Civ.Stat. Art. 4413(401) § 1.02. In the opinion, the *Alberti* court also transferred the third-party complaint and the supplemental complaint to the *Ruiz* court.

On October 11, 1989, the county moved to supplement or amend the September 25, 1989, findings of fact and conclusions of law and, alternatively, for a new trial. The *Alberti* court denied the motion on October 23, 1989. Shortly thereafter, both the county and the state filed protective notices of appeal. This court dismissed the appeals as premature on January 3, 1990.

E. *Subsequent remedial orders.*

After the transfer to the *Ruiz* court in the September 25 findings of fact and conclusions of law, the *Alberti* and *Ruiz* courts combined to hold joint hearings and issue joint orders on the

remedial aspects of the *Alberti* case.1 The parties at first engaged in settlement negotiations, but when the prospects for settlement dimmed, the combined courts ordered the county and state to submit proposed remedial plans by January 17, 1990. After the parties submitted their proposed plans, the combined courts held joint hearings on February 27 and 28, 1990.

On March 15, 1990, the combined courts entered a joint remedial order, directing the county and state to reduce the jails' population to 6700 upon entry of the order and to 6100 by August 31, 1990. The order contained a number of additional provisions, addressing among other matters a reduction in the population of ready-felons, the development of alternatives to incarceration, and releases of prisoners in the event of non-compliance.

After the parties moved the combined courts to alter or amend the order, the courts vacated the March 15 order and replaced it with a second order, *munc pro tunc*, on April 5, 1990. The April 5 order directed the county and state to reduce the jails' population to 6700 upon entry of the order, to 6400 by May 15, 1990, and to 6100 by August 31, 1990. The order specifically required the state to remove 9130 ready-felons between February 1 and August 31, 1990. The state complied with this aspect of the order. Like the March 15 order, the April 5 order provided for the development of alternatives to incarceration and, in addition, directed releases of prisoners in the event of non-compliance. The combined courts denied the parties' motions to alter or amend the order, or for a new trial on April 25, 1990.

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1 In an opinion issued shortly after the transfer, Judge Justice described the transfer as partial. Citing *In re Clements*, he stated that:

> it is apparent from the Court of Appeals' opinion that the *Alberti* court retains the power to order certain forms of relief against the State Defendants, so long as that relief does not require those defendants to "receive or take prisoners into TDC" or to take other action "in the operation or management of TDC-operated facilities."

Judge Justice proceeded to direct his special master in *Ruiz* to confer with the *Alberti* special master.

The April 5 order proved effective in reducing the jails' population. By August 13, 1990, the total population stood at 6097, or 130% of design capacity, and the population of ready-felons had dropped to 1069. The renovation of the old central jail at 301 San Jacinto, completed in December of 1989, had increased the combined design capacities of the county's jails to 4698.

Upon the expiration of the April 5 order, the combined courts issued a third joint remedial order on September 7, 1990. In the order, the courts purported "to bridge the next 12 months" until the completion of the new facility at 701 San Jacinto, designed to house an additional 4000 prisoners. The order first required the county to occupy the new facility by September 1, 1991, and provided for "a substantial daily fine for each day beyond September 1, 1991 they failed to occupy the 701 Building." The order further directed the county and state to reduce the jails' population to 6100 upon entry of the order and to 6000 by December 31, 1990, capping the ready-felon population at 1350 and the remaining population at 4751, to be reduced to 4650 by December 31, 1990. Again, like the earlier orders, the September 7 order provided for the development of alternatives to incarceration and directed releases of prisoners in the event of non-compliance.

Pursuant to the September 7 order, the *Alberti* court issued four orders directing the release of 254 pretrial and convicted misdemeanants on September 14, 17, and 18, 1990. Both the county and the state appealed this order. The state obtained a partial stay of the order from this court on September 21, 1990. We later withdrew the stay on the understanding that, first, the combined courts would not release felons without sufficient notice for application by the parties for further stay and, second, that the parties would work together "to obtain a process that will protect the public safety and the integrity of the criminal justice system as well as the rights of prisoners."

Prior to the releases, the county and state had moved the combined courts to alter or amend the September 7 order, or alternatively, for a new trial. The *Alberti* court set a hearing for October 22, 1990, and ordered the defendants to submit new proposed remedial plans. The court specifically announced that the alternatives to be considered at the hearing would include "(1) temporary housing and the expense and time necessary for the construction thereof and (2) the utilization of facilities of

nearby counties which may have available jail space." After the hearing, the court concluded that the county and state had "not yet developed a feasible strategy for addressing the overcrowding problem in Harris County detention facilities that precludes the need for further releases of inmates, although elements of a possible solution surfaced." The court accordingly directed the defendants to meet with the monitors in the *Alberti* and *Ruiz* cases and "to jointly develop an acceptable plan for dealing with the short-term population crisis in Harris County facilities."

On November 19, 1990, the *Alberti* court stayed the releases authorized in the September 7 order, giving the county and state sixty days to implement alternative programs designed to bring the jails' population within the caps set in the September 7 order. The November 19 order also contained a fallback provision; it stated that if the required caps were not met within sixty days, the court would require "the defendants, or either of them . . . to contract for the use of private jail cells or empty county jail cells around the State to house excess prisoners."

On February 7, 1991, upon finding that the jails' population still exceeded the caps set in the September 7 order, the *Alberti* court issued a fourth remedial order. Evidencing a growing impatience, the court refused the state's request to further delay implementation of the population caps established in the earlier orders. Instead, the court implemented an alternative remedy pending the opening of a boot camp in April of 1991 and the new facility at 701 San Jacinto in September of 1991. The order first directs the county and state to reduce the jails' population to 6300 within 45 days. County prisoners, including felons not ready for transfer, are not to exceed 4725 (75% of capacity), and ready-felons are not to exceed 1575 (25% of capacity). If necessary to meet the population caps, the order directs the county sheriff to transfer ready-felons to facilities in other counties. The state is required to deposit $750,000 with the *Alberti* court's registry by March 20, 1991. The order authorizes the county to pay up to $40 per day for the housing of each transferred prisoner, the expenditures are to be reimbursed by the state's deposit to the extent that ready-felons exceed the 1575 cap.

Unlike the previous remedial orders, the February 7 order was not a product of the combined courts. Instead, Judge Justice wrote separately "to clarify my relationship to the relief set

forth." Although he conceded that the order was within the scope of *Alberti*, he suggested that the requirement that the state deposit $750,000 "seemingly falls within the purview of *Ruiz*" and stated that he "would abstain" from deciding whether, under Texas law, the state was obliged to pay costs incurred by the county in housing ready-felons in other counties' facilities.

Both the county and state filed motions to modify the February 7 *Alberti* order. The state also filed a motion to vacate the order and a notice of appeal. While the motions to vacate were pending, the state petitioned for a writ of mandamus from this court, asking that we vacate the portion of the February 7 order requiring the state to deposit $750,000 and, in addition, either enforce or modify our previous decision in *In re Clements*. Alternatively, the state requested a stay of the portion of the order requiring the $750,000 deposit, a writ of prohibition, summary reversal, or certification to the Texas Supreme Court.

On March 15, 1991, the *Alberti* court slightly modified the order and denied the motions to vacate or stay the order. The county and state then filed new notices of appeal. On March 21, 1991, this court similarly denied the state's request for a stay of the portion of the order requiring a $750,000 deposit. The Supreme Court temporarily stayed the provision the same day, but on April 1, 1991, withdrew the stay. The state and county now appeal the September 25 findings of fact and conclusions of law and each of the subsequent remedial order.

II.

The county and the state initially offered little resistance to the assertion that excessive overcrowding in the county's jails renders the conditions of confinement for the plaintiff class unconstitutional. While this appeal was pending, however, the Supreme Court held in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), that the Eighth Amendment "mandate[s] inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." In supplemental briefs to this court, each defendant argued that only the other acted with the requisite intent.

Even after *Seiter*, then, the heart of the appeal remains the relative responsibilities of the state and county. The county believes that the state should shoulder full responsibility, as the overcrowded conditions have resulted largely from the huge

backlog of ready-felons. The state, on the other hand, contends that state law places full responsibility for the jails on the county. In formulating its remedial orders, the *Alberti* court faced the difficult task of remedying the constitutional violation without intruding on the state's right, as a sovereign, "to decide who will be held liable for civil rights violations that occur in the course of carrying out [state powers]." *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986). We believe the balance was well struck by the *Alberti* court. However, we vacate and remand the liability findings against the state and the county to allow the *Alberti* court to consider the effect of *Seiter*. Before addressing the liability and remedial issues, we turn to two jurisdictional issues.

A. *Jurisdictional issues*:

1. *The expired remedial orders.*

[1] The first three remedials orders, issued on March 15, April 5, and September 7, are now expired. The county argues that the orders are still appealable, however, because the issues presented by the orders are "capable of repetition, yet evading review." *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). We took this position in an order denying the state's motion to dismiss the county's appeal of the first remedial order as moot but noted that, upon further consideration, the oral argument panel might find the appeal moot. The plaintiffs contend that the first two remedial orders are moot even under *Bell* because the latest order, issued on February 7, 1991, expressly "superseded" them. However, we continue to find the county's characterization convincing. *See National Wildlife Federation v. Costle*, 629 F.2d 118, 123-24 n. 19 (D.C.Cir. 1980).

2. *The medical care findings.*

[2, 3] In its September 25 findings of fact and conclusions of law, the *Alberti* court suggested that the medical conditions in the county's jails constituted an independent constitutional violation.2 However, none of the remedial orders specifically

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2 The *Alberti* court found that the poor level of medical care reflected "conscious indifference towards the inmates' serious medical needs." Under *Seiter*, 111 S.Ct. at 2321, and *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), this finding alone establishes an Eighth Amendment violation.

address medical care. The plaintiffs contend that the county's challenge to the medical care findings is thus premature. We agree with the plaintiffs, but not fully with their characterization of the relevant jurisdictional defect. There has been no final judgment in the *Alberti* case, and the state and county are thus appealing the remedial orders under 28 U.S.C. § 1292(a)(1). As medical care has not yet been implicated in a remedial order, the related findings are outside the § 1292(a)(1) exception to the final judgment rule.

B. *Liability issues*:

1. *The relative obligations of the state and the county.*

[4] The starting point in evaluating the relative obligations of the state and the county is *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986). In *Bush*, a class of county inmates brought an action under § 1983 to compel a newly created state commission, the Texas Commission of Jail Standards, to discharge its state law duties. The authorizing statute required TCJS to establish minimum standards for county jails and to review reports of noncompliance. Additionally, the statute gave TCJS discretionary enforcement powers. The plaintiffs urged a "supervisory liability" theory, suggesting that TCJS legally caused constitutional wrongs that it failed to prevent or correct. In rejecting the plaintiffs' theory, we reasoned that Texas law identifies county sheriffs and commissioners courts, not TCJS, as keepers of the county jails. *Id.* at 1206. *Bush* thus concluded as follows:

> [A]ccepting for now the concept that the breach of a state-imposed duty can cause a constitutional tort, we hold that the necessary causal relationship is absent when a state duty to regulate, monitor, inspect, or advise is not accompanied by an obligation to extirpate constitutionally substandard conditions or activities that may be encountered.

Id. at 1208.

Particularly relevant to this appeal is the final section of *Bush*, where we explained "the different roles that state and federal law inevitably play in the analysis of constitutional torts." *Id.* at

1208. Whenever a plaintiff alleges a cause of action under § 1983, a federal court must ask three questions. First, is a federally secured right affected? In some cases, particularly procedural due process cases, the federal court must look to state law to answer related threshold questions, such as "whether the claimant in fact had a property right in whatever it was that was taken away from him," but the right itself is defined by federal standards. *Id.* at 1209. Second, was the alleged deprivation of the right accomplished by state action? Here again, some reference to state law is necessary, but "the definition of state action is ultimately a question of federal law." *Id.* Finally, who is the state actor responsible for the violation? Unlike the first two questions, the third question turns *exclusively* on state law. "The states have virtually complete freedom to decide who will be responsible for such tasks, and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out." *Id.*

The hard question in this appeal is the third question, the issue of who is liable for the conditions in the county's jails. The county clearly has some responsibility for the conditions in its own jails. Texas law requires the county's commissioners court to provide "safe and suitable jails" and makes the county's sheriff "keeper of the county jail." Tex. Local Govt. Code §§ 351.001 and 351.041. The county does not deny these obligations; rather, it argues that the objectively cruel conditions in its jails have resulted solely from the state's backlogging of ready-felons. For reasons discussed more fully below, *Seiter* gives some new fuel to the county's argument.

By contrast, the state denies any responsibility for the conditions in the county's jails. The *Alberti* court twice rejected the state's contention that Texas law makes the county solely liable, first in an order denying the state's motion to dismiss the county's third-party complaint and again in its September 25 findings of fact and conclusions of law. The court distinguished *Bush* because "[i]n contrast to the Texas Commission of Jail Standards, Third-Party Defendants have a state and constitutionally imposed duty to provide appropriate conditions of confinement for the approximately 3500 convicted felons currently incarcerated in the Harris County Jails." In support of this conclusion, the court cited *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), a remarkably similar case.

In *Stewart*, a class of inmates housed in Mississippi county jails brought an action against both county and state officials under § 1983 to challenge the conditions of the jails. The district court granted the state's motion to dismiss on the ground that the state had no authority over the county's jails. On appeal, however, this court held that the district court erred in dismissing the claims against the state. We reasoned as follows:

> Several of the named plaintiffs, and thousands of the putative class members, are state prisoners committed to the custody of the Mississippi Board of Corrections. The district court's holding would allow the defendant state officials to relegate their prisoners to "cruel and unusual punishment" so long as they have no power to change the conditions of confinement in county jails. We reject this theory. This court has consistently held that state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners in their custody on the ground that it is beyond their power to effect the changes necessary to bring the conditions up to minimal standards. [citations omitted] Even if the district court were correct in deciding that the defendant state officials have no authority to make changes in county jails, the district court could have ordered the state officials to remove prisoners in their custody from any county jail found constitutionally inadequate, or, in the alternative, offered them the opportunity to assist the county in making the necessary changes in order to continue using the jail to incarcerate state prisoners.

Id. at 332.

Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), and *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984), like *Stewart*, involved essentially identical situations. In *Benjamin*, after city inmates brought a § 1983 challenge to the conditions of New York City jails, the city moved to join the state of New York as a third-party defendant. The city contended that the overcrowding in its jails resulted from the state's failure to accept convicted felons as required by state statute:

> When a sentence of imprisonment is pronounced, or when the sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with.

N.Y. Criminal Procedure Law § 430.20. The district court granted the city's motion and directed the state to accept felons within 48 hours from the completion of transfer processing.

On appeal, the Second Circuit rejected the state's *Pennhurst* argument and affirmed the order joining the state. Its opinion echoes of *Stewart*:

> [P]risoners whom [the state] refuses promptly to accept into its prisons are not those of some other state, county, or planet, but its own prisoners who have been convicted by New York State courts of New York felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith."

Id. at 51 (emphasis in original).

In *Tate*, after county inmates brought a § 1983 challenge to the conditions in Jefferson County jails, the county filed a third-party complaint against the state of Kentucky. The state had adopted a "controlled intake policy" pursuant to a consent decree in litigation involving its own prisons, and in accordance with the policy, refused to timely accept felons in the county's jails awaiting transfer to state prisons. After finding that the overcrowded conditions in the county's jails were caused in part by the state's policy, the district court issued an order directing state officials to reduce the number of felons in the county's jails by transferring felons to a state prison within thirty days of sentencing.

On appeal, the state argued that the district court erred in allowing the third-party complaint. The Sixth Circuit affirmed, finding a "substantive basis" for the claim in a state statute:

> When an indeterminate term [1 year or more] of imprisonment is imposed, the court shall commit the defendant to the custody of the bureau of corrections for the term of his sentence and until released in accordance with the law.

Kentucky Revised Statute § 532.100. An accompanying commentary states that § 532.100 "assures that felony offenders, once convicted and sentenced to imprisonment, *shall* be delivered to the Department of Corrections, with the specific place of incarceration to be left to the Department." As the case involved a preliminary injunction, the Sixth Circuit reviewed the district court only for abuse of discretion. But the Sixth Circuit rejected the state's *Pennhurst* argument, affirming the district court's finding that the state was partly responsible for the unconstitutional conditions in the county's jails.

The state's attempt to distinguish *Benjamin* is without merit. The state argues that the result in *Benjamin* turned partly on the fact that New York's refusal to accept convicted felons made it "impossible for the city to comply with the district court's judgment against it in the plaintiffs' favor." The state then cites *Badgley v. Vareles*, 729 F.2d 894, 901 (2d Cir. 1984) for the proposition that, if complete relief can be obtained from the county, then there is no right to an order against the state. The real difference between *Benjamin* and *Badgley*, however, was that in *Badgley* New York was not adjudicated a constitutional violator. *See Benjamin*, 803 F.2d at 52.

The state's reliance on *Bush* is thus misplaced unless the Texas scheme is significantly different from the schemes in Mississippi, New York, and Kentucky. In its September 25 findings of fact and conclusions of law, the *Alberti* court reasoned that the state was jointly liable for the unconstitutional conditions in the county's jails because, although the sheriff is the keeper of the jail, the state is responsible for the confinement of convicted felons under Tex.Pen.Code §§ 12.31-12.34 and Tex. Code Crim. Pro. Art. 42.09. Before the 1989 amendments, continued the court, the transfer of convicted felons was governed by the interplay between Tex. Code Crim. Pro. Art. 42.09 and Tex.Gov. Code § 499.006--§§ 1 and 4 of Art. 42.09 envisioned

"at least a temporary stay at the jail when a felon does not appeal his conviction or when a felon appeals his conviction but his sentence is for a term of ten years or less," while § 499.006 provided for a "safe and speedy" transfer to a state facility.3

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3 The relevant Texas provisions are as follows:

1. *Tex.Pen.Code Ch. 12 (punishments) §§ 12.31-12.34 (ordinary felony punishments):*

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These provisions state that individuals adjudged guilty of a capital felony, first-degree felony, second-degree felony, or third-degree felony "shall be punished by confinement in the Texas Department of Corrections."

2. *Tex.Rev.Civ.Stat. Art. 4413(401) (Department of Criminal Justice) § 1.02 (responsibilities):*

This provision states that the Department of Criminal Justice has "primary responsibility for (1) the confinement, supervision, and rehabilitation of felons."

3. *Tex.Code Crim Pro. Ch 42 (judgment and sentence) Art. 42.09 (commencement of sentence, delivery to place of confinement):*

Section 1 states that, except as otherwise provided, the defendant "shall be delivered to jail or to the Department of Corrections when his sentence to imprisonment is announced." If the defendant is convicted of a felony and sentenced more than ten years, and he gives notice of appeal, § 3 states that he "shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals." If on the other hand, he is convicted of a felony and sentenced less than ten years, and he gives notice of appeal, § 4 states that he shall only be transferred to the Department of Corrections upon his request. *See Ex parte Rodriguez*, 597 S.W.2d 771 (Tex.Cr.App. 1980). None of the provisions specify the proper course *absent* an appeal. Finally, § 8 states that the Department of Corrections "shall not take a defendant into custody" until it receives specified documents from the county.

4. *Tex.Code Crim.Pro. Ch. 104 (certain expenses paid by state and county) Art. 104.002 (expenses for prisoners):*

Although the 1989 amendments deleted the requirement of a "speedy" transfer and authorized the adoption of the scheduled admissions policy, the *Alberti* court concluded that the amendments did not relieve the state of its responsibility for the confinement of convicted felons:

> The State of Texas is free to allocate the admissions of felons into the penitentiary in virtually any manner it chooses so long as the allocation does not result in the cruel and unusual punishment of inmates. However, when it becomes clear that convicted felons are being

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This provision states that "a county is liable for all expenses incurred in the safekeeping of prisoners confined in the county jail or kept under guard by the county." It also provides for inter-county (but not state-county) reimbursements.

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5. *Tex.Gov.Code Ch. 494 (Texas Department of Corrections--contracts):*

Adopted as part of the 1989 amendments, this chapter authorizes the Board of Corrections to contract with a private vendor *or* a *county* commissioners court for jail space. *See* Ë 494.001. A private vendor or county under contract with the Board has no authority to compute parole or release dates, award good time, approve furloughs, or reclassify inmates. *See* § 494.004.

6. *Tex.Gov.Code Ch. 499 (miscellaneous matters) Art. 499.006 (transportation of inmates):*

Before its 1989 amendment, this provision stated that the director of the Board of Corrections "shall adopt rules to provide for the safe and speedy transfer of inmates from the counties in which inmates are sentenced to the department." Now, the provision states that the director "shall make suitable provision and regulations for the safe transportation or prisoners from counties where sentenced to the State penitentiary."

7. *Tex.Local Gov.Code Ch. 351 (jails and law enforcement) § 351.041 (sheriff):*

This provision makes the sheriff of each county "the keeper of the county jail."

> confined in conditions that violate the Eighth Amendment, the relevant inquiry becomes who is responsible for those inmates. Fortunately, H.B. 2335 [the 1989 amendatory act] provides a clear answer to this inquiry. Section 1.02(a)(1) provides, "The department [TDCJ, formerly TDC] is the state agency with *primary* responsibility for . . . the confinement, supervision, and rehabilitation of felons." Thus, the fact that the State of Texas has "virtually complete freedom to decide who will be responsible" for the confinement of felons provides no shield from liability for the State Defendants in this case because state law clearly places the primary responsibility for the confinement of felons upon them. *See Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986).

The *Alberti* court's reasoning is consistent with that of the only state court to have addressed the issue. After the 1989 amendments, Nueces County and Harris County both filed suit in Travis County, contending that the state still had the responsibility either to promptly remove ready-felons or to reimburse the counties for the costs of their housing. In both cases, the state court ruled for the county on the merits; one case is now on appeal, and the other still before the district court on damages issues. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist.Ct. of Travis County, 126th Judicial Dist. of Texas 1991); *Harris County v. State of Texas*, No. 465,468 (Dist.Ct. of Travis County, 126th Judicial Dist. of Texas, pending).4 Since our task, as set forth in *Bush*, is to

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4 The reasoning of the state court is best laid out in a letter from the judge to the parties dated May 31, 1990. The court reasoned that the statutory provisions placing responsibility for felons with the state were quite clear. Tex.Pen.Code §§ 12.31-12.34; Tex.Crim.Pro.Code Art. 42.09; Tex.Gov.Code § 499.006. On the other hand, the provision cited by the state, the scheduled admissions policy, was ambiguous. "It neither expressly relieves the state of the duty to take and confine felons nor expressly

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places that duty on the counties." The court was also influenced by the awkward effects that in its opinion, the state's interpretation would have:

decide who is liable for the violation under *state* law, we find it appropriate to defer to the state courts on the issue.[5]

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1. H.B. 2335 which places "primary responsibility" for the confinement, supervision and rehabilitation of felons on the Texas Department of Criminal Justice will be rendered meaningless. [citations omitted]
2. The statutes cited above which unambiguously require that TDC confine felons will, in effect, be repealed.
3. The portions of the court orders which sentence felons to TDC will be meaningless.
4. New duties will be placed on the counties which they have never had before possibly in violation of Article 5, § 18(b) of the Texas Constitution. Conversely, the State will be relieved of duties clearly placed on it by statute.
5. The taxpayers of the affected counties will have to shoulder a tremendous financial burden which under the unambiguous statutes should be borne by the whole state.

The court also noted that a bill relieving the state of financial responsibility for felons left in county jails was introduced, but failed to pass.

As the county points out, the state is a party to both *County of Nueces* and *Harris County*.

5 We find no merit in several related arguments urged by the state. For example, the state argues that, under the supremacy clause, "any such state law duty to accept inmates more speedily (if it ever existed) must give way to orders entered by the federal district court in *Ruiz*." The *Alberti* obligation arises from the Eighth Amendment. The consent decree in *Ruiz* must give way to its demands. At any rate, the *Alberti* court specifically found that the state "could have complied with the requirements of the *Ruiz* decree without refusing to accept prisoners."

The state also makes several intent arguments. First, the state points out that "the Very Legislature that passed § 1.02 [stating that the state has "primary responsibility" for felons] failed to enact any appropriations that would enable State Defendants to assume responsibility for the care or treatment of convicted felons in local jails." This argument fails to explain the contemporaneous passage of Tex.Gov.Code § 494.001, authorizing the state to contract for jail space with private vendors or counties. Second, the state contends that the Legislature rejected three bills to compensate states for holding ready-felons. But, as the county points out, these "proposed" bills never even reached the floor for a vote.

2. *The deliberate indifference requirement.*

[5] Our conclusion that state law imposes responsibilities on both the state and the county does not end our inquiry. At the time of the liability hearings before the *Alberti* court, the focus of the parties and the court was on the objective conditions of confinement in the county's jails. *See Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). This circuit had earlier held that "unlike 'conduct that does not purport to be punishment at all' as was involved in *Gamble* and *Whitley*, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement." *Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986)), vacated on other grounds, 858 F.2d 1101 (5th Cir. 1988). Both the county and the state expressly conceded that excessive overcrowding rendered the conditions of confinement in the county's jails unconstitutional, and each attempted to persuade the court that the other should shoulder full responsibility.

While this appeal was pending, however, the Supreme Court held that prison conditions rise to the level of cruel and unusual punishment only when they are a product of state indifference. In *Wilson v. Seiter*, ___ U.S. ___, ___, 111 S.Ct. 2321, 2325, 115 L.Ed.2d 271 (1991), the Court identified the source of this subjective requirement as "the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." In prison conditions cases, like *Alberti*, the requisite intent is "deliberate indifference" as articulated by the Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). *Id.* ___ U.S. at ___, 111 S.Ct. at 2326.[6]

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6 In *Seiter*, the Supreme Court stated that, in emergency situations, the requisite intent rises to "acting `maliciously and sadistically for the purpose of causing harm.'" *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2321. The state argues that we should apply this higher standard because of a purported clash between the state's responsibility to ready-felons in the county's jails and its responsibilities under the *Ruiz* decree. We think it clear, however, that the Court was concerned with short-term emergencies

The deliberate indifference requirement of *Seiter* and *Estelle* is not wholly separate from the objective requirement of *Rhodes*. In *Seiter*, the Court explained that the "long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent." *Id.* at ___, 111 S.Ct. at 2325. Several lower courts, cited in *Seiter*, have found deliberate indifference where prison officials were aware of objectively cruel conditions but failed to remedy them. *See Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 560 (1st Cir. 1988); *Morgan v. District of Columbia*, 824 F.2d 1049, 1063 (D.C. Cir. 1987). In *Alberti*, there is little doubt that both the county and the state knew that the conditions of confinement in the county's jails deprived the inmates of basic needs. The county's jails had been under the continuing jurisdiction of the *Alberti* court since 1975, the monitors' reports became increasingly strident after mid-1988, and both the county and the state expressly admitted that he conditions of confinement were objectively unconstitutional during the liability hearings.

In deciding whether the county and the state were deliberately indifferent to the needs of the plaintiffs, however, we must also consider any relevant constraints. As Justice Scalia explained, "whether [conduct] can be characterized as 'wanton' depends upon the constraints facing the official." *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), written by former Justice Powell and cited extensively in *Seiter*, is instructive. In *LaFaut*, a paraplegic prisoner alleged that prison officials had denied him adequate toilet facilities and necessary physical therapy in violation of the Eighth Amendment. In reviewing the district court's findings, Justice Powell noted that, although LaFaut specifically informed prison officials that his toilet facilities were inadequate, they made no attempt to modify the facilities for two months and, when their initial attempt failed, waited another month before transferring LaFaut to a cell with adequate facilities. Similarly, although LaFaut repeatedly requested physical therapy and official medical reports confirmed the need for therapy, he waited two months for minimal motion therapy and eight months for a transfer to an institution with adequate therapy.

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where prison officials must act "in haste, [and] under pressure." *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 1084, 89 L.E.d2d 251 (1986).

Justice Powell concluded that, because there was no reason for the delays, the prison officials had been deliberately indifferent to LaFaut's needs:

> There is nothing in the record before us . . . to justify the inordinate delays in accommodating appellant's needs in light of the practicality and availability of various solutions. Prison officials should not ignore the basic needs of handicapped individuals or postpone addressing those needs out of mere convenience or apathy. As appellee Hambrick was the responsible official in charge of Butner, and she was fully advised both of the inhumane conditions of appellant's confinement and the failure to provide him with needed therapy we concluded that her neglect constituted "deliberate indifference" and therefore violated the Eighth Amendment.

Id. at 394.

The state contends that its actions were not deliberately indifferent but instead necessitated by the *Ruiz* decree and the over-crowding problems in its own prisons. However, the *Alberti* court specifically found that:

> State Defendants could have complied with the requirements of the *Ruiz* decree without refusing to accept prisoners. Federal authority did not require them to refuse to accept inmates from county jails. The most obvious alternative would have been to timely build new prison facilities. The Court described other alternatives [such as contracts with other suitable facilities or early releases as authorized by the Texas Prison Management Act, Tex.Rev.Stat.Ann. Art. 6184*o*] in its May 12, 1989 Memorandum and Order.

There is no doubt that the relevant state officials knew that ready-felons were being backlogged despite the objectively cruel conditions in the county's jails. Yet the state chose to leave them in the jails. This is strong if not compelling evidence of deliberate indifference to the plight of these ready-felons, and it is only accented by the alternatives available to the state. As found by

the *Alberti* monitors, the state's management of ready-felons in Harris County "in essence . . . ignore[d] those state prisoners. . . . " Significantly, the state could have housed prisoners in a variety of ways. Even housing them under conditions of a military bootcamp would not touch the Eighth Amendment. Indeed, a tent city would be far superior to the conditions in the county's jails. The state cannot turn away from the use of such common sense solutions by pointing to the *Ruiz* decree. The district court explicitly found that the decree was no impediment; and in any event, the *Ruiz* decree could not legally impede such plain responses, at least to the extent its constraints were not themselves required by the Constitution.

Nor does this record offer substantial evidence that the state's actions were constrained by legislative refusal to fund the only means by which the state could have relieved the county. Before *Seiter*, it was well established in this circuit that "inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980); *see also Gates v. Collier*, 501 F.2d 1291, 1319-20 (5th Cir. 1974). Other circuits have found deliberate indifference over allegations of inadequate funding. *See Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 705 (11th Cir. 1985); *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983). The issue is assured currency by the intent requirement of *Seiter* and that opinion's leave of it. *See Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. We need not address the issue here in the absence of findings pointing the finger at the legislature. In short, however, this record leaves us skeptical of the assertion that a recalcitrant legislature was the culprit.

We would, by necessity, affirm a finding that the state was deliberately indifferent. Indeed, such a finding on this record would be virtually unassailable. There is understandably no such finding, however, because deliberate indifference was not an issue when the *Alberti* court ruled. As strong as the case is, we are reluctant to conclude that a finding of deliberate indifference is compelled as a matter of law. Factfinding is a province of the district court. We therefore remand for the appropriate findings and leave to the district court the decision to take any further evidence.

[6] The county also argues that its actions were not deliberately indifferent after *Seiter*. Again, there is no finding,

but here the record offers some evidence of arguably formidable constraints. The *Alberti* court noted in its September 25 findings of fact and conclusions of law that, until the state began refusing ready-felons, "it appeared that a spirit of cooperation between Plaintiffs and County Defendants would eventually led to full compliance with all Court orders with a minimum of direct judicial intervention." In June of 1987, the county's jails were only five percent over capacity, and the number of ready-felons in the county's jails had regularly fluctuated between 100 and 200 for several years. Upon the state's decision to backlog ready-felons, their numbers quickly jumped to 512 in September of 1987, 798 in December of 1987, 2100 in December of 1988, and 3420, or 45% of the total population of 8086, by the time of the liability hearing in August of 1989.

In light of the increase in the population of ready-felons over such a short period of time, we cannot conclude from the record as it now stands that the county has deliberately ignored the needs of its inmates or that its delay in accommodating the overcrowding has been "inordinate." *LaFaut*, 834 F.2d at 394. By contrast, any increase in the population of state prisoners, including ready-felons, was expressly contemplated by the state. The 95% "crowding stipulation" in *Ruiz*, signed by the state, provides that:

> The parties further acknowledge that certain conditions and eventualities are within the contemplation of the parties. These include the possibility that TDC may experience a substantial increase or decrease in its population.
> . . .

See Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987).

While the huge jump in the population of ready-felons might weigh against a finding of deliberate indifference, other facts could weigh in favor of such a finding. For example, the *Alberti* court found problems with the jails' plumbing, ventilation, fire safety, supplies, food service, and medical care. The *Alberti* court also found that the constitutional capacity of the county's jails equalled their designed capacity and that "[e]ven if all TDC-ready prisoners were removed from the jail, the population would still exceed design capacity by approximately 400 inmates." The 1975 consent decree could also factor into the county's liability. We thus remand for the appropriate finding

and, again, leave to the *Alberti* court whether it will conduct further hearings or consider additional evidence.

[7] Although we do not decide the liability question, one remaining issue is relevant to the remand. The county argues that the *Alberti* court erred in equating the constitutional capacity of its jails with their design capacity. But, in its September 25 findings of facts and conclusions of law, the court expressly recognized its obligation to consider the "totality of the conditions." And its findings contemplate a number of factors in addition to design capacity--the fact that thousands of inmates were sleeping on the floors, the physical design of the cellblocks, the inability of the staff to control the inmates, the increase in disciplinary violations, plumbing problems, poor ventilation, the absence of a sprinkler system or a second means of egress in the event of a fire, supply shortages, insufficient food service, inadequate medical care, and the outbreak of a pneumococcal infection. In sum, then, the finding was not clearly erroneous.

C. *Remedial issues:*

[8] The state's attacks on the remedial orders are all jurisdictional. First, the state argues that the orders violate the Eleventh Amendment because they enforce state law against the state, citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 97 L.Ed.2d 67 (1984), *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), and *Kelley v. Bd. of Educ. of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987). The state contends that the county is fully responsible for the conditions in its jails and that any duty the state might have to promptly remove ready-felons arises only under state law. While we agree with the state's premise, we reject its assumption that its duties arise only under state law. As discussed above, in *Stewart*, 669 F.2d at 333, a case involving a challenge to overcrowded conditions in Mississippi county jails, this court found the state partially responsible for the unconstitutional conditions because "state officials cannot shed their constitutional obligations by putting state prisoners in county jails." *Accord Benjamin*, 803 F.2d at 46; *Tate*, 735 F.2d at 986. Although *Stewart* predated *Pennhurst*, both *Benjamin* and *Tate* rejected *Pennhurst* arguments in identical situations. As reasoned by the Second Circuit:

> This argument [*Pennhurst*] must be rejected, however, for the reason that the prisoners whom [the state] refuses promptly to accept into its prisons are not those of some other state, country, or planet, but its own prisoners who have been convicted by New York state courts of New York felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith."

Benjamin, 803 F.2d at 51 (emphasis in original). In sum, because the state is responsible for ready-felons, *Pennhurst*, *Bush*, and *Kelley*, are distinguishable.[7]

[9] The state also urges that the orders violate the Eleventh Amendment because they exact monetary rather than prospective relief. Like the *Pennhurst* argument, however, this contention mischaracterizes the orders--the plaintiffs established a federal constitutional violation, and the state is a responsible party. The required payments are thus "a necessary consequence of compliance in the future with a substantive federal question determination." *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974); *see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Williams v. Edwards*, 547 F.2d 1206, 1212-13 (5th Cir. 1977); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), *rev'd in part on other grounds*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). *Kelley*, cited extensively by the state, is distinguishable--the order remedying the violation in *Kelley* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order. *See Kelley*, 836 F.2d at 990-94.[8]

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7 In *Kelley*, cited extensively by the state, Tennessee was not a present constitutional violator when the order against it was entered. *See Kelley*, 836 F.2d at 989-90, 993-94.

8 The state also makes a general federalism argument, suggesting that "[a] federal court has no jurisdiction (no power) to act as arbiter between different levels of a State's government that are in dispute." Again, this argument mischaracterizes the action; the state is responsible for a

[10] Finally, the state argues that the *Alberti* court should have abstained from ordering it to pay for the housing of ready-felons in other county's jails pending the ultimate resolution of the state litigation, discussed above. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas 1991); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas, pending). But none of the abstention theories cited quite fit the facts of *Alberti*. The *Alberti* court has already decided the federal issue; the state issue implicates only the remedy. Moreover, in resolving the state issue, the *Alberti* court simply adopted the approach of the only state court to have decided the issue pending a decision by a higher state court. *See County of Nueces*, No. 452,071 (holding that the state must compensate the county $40 per day for each ready-felon left in the county's jails more than seven days after sentencing).

In sum, the state courts should eventually determine whether the state or the county is responsible for ready-felons in the county's jails. The *Alberti* court's assessment of costs was "tentative" and "contingent on . . . the outcome of pending litigation in State courts over the allocation of costs for maintaining felons ready for transfer to the TDCJ-ID in county facilities." The issue, then, is whether the state or the county should pay for the housing of ready-felons in other county jails pending the resolution of the state litigation. If the state is found liable on remand, plaintiffs are entitled to their long-awaited remedy. The state's arguments seem to assume that the county should pay all housing costs until the state courts decide otherwise. But the presumption is baseless. Assuming the findings of state liability, the *Alberti* court chose the best available course in modeling relief on *County of Nueces*.

Because the liability findings against the county are far more problematic, we do not address the remedial issues raised by the county.

D. *Procedural issues:*

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federal constitutional violation. Unless the plaintiff were to be left with no remedy, the *Alberti* court had to apportion liability between the state and county. The relevant federal question, then, is the Eighth Amendment issue; the dispute between the state and the county implicates only the remedy.

1. *The jurisdiction of the Alberti court to unilaterally impose the February 7 order.*

[11] The state does not argue, as it did in an earlier request for mandamus, that the February 7 order violates our opinion in *In re Clements*, 881 F.2d 145 (5th Cir. 1989). Instead, the state contends that the *Alberti* court was without jurisdiction to unilaterally impose the order because, in its September 25 findings of fact and conclusions of law, the *Alberti* court transferred both the county's third-party complaint and the plaintiff's complaint against the state to the *Ruiz* court. In *In re Clements*, we transferred to the *Ruiz* court

> so much of the *relief* portion of the third-party complaint as seeks an injunction ordering our individual petitioners (in their official capacities) to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities.

In re Clements, 881 F.2d at 154. The September 25 transfer by the *Alberti* court was arguably broader than required by *In re Clements*; upon finding the state liable, the *Alberti* court

> ORDERED that County Defendants' third-party complaint and Plaintiffs' supplemental complaint are TRANSFERRED to the Honorable William Wayne Justice for proceedings in accordance with the mandamus opinion of the Fifth Circuit of Appeals entered in this case.

The *Alberti* court retreated in its February 7 order, however, where it stated:

> None of the remedial measures encompassed in this order affect the population cap imposed on TDCJ institutions as a result of the various orders and agreements in the *Ruiz* case, nor do they require the supersedence of the statutorily-based allocation formula adopted by the State defendants to protect the integrity of the *Ruiz* orders and agreements.

As evidenced by his separate February 7 *Ruiz* opinion, Judge Justice disagreed.

The cases cited by the state involve inter-district transfers. The plaintiffs contend that an intra-district transfer, by contrast, does not divest the transferor of jurisdiction. They point to the fact that both the *Alberti* and the *Ruiz* courts are a party of the Southern District of Texas and conclude that Judge DeAnda had the jurisdiction to impose the remedy regardless of the transfer. "Jurisdiction is lodged in a court, not in a person." *In re Brown*, 346 F.2d 903, 910 (5th Cir. 1965).

We need not address the distinction urged by the plaintiffs because we read the transfer order by the *Alberti* court to transfer only limited jurisdiction to the *Ruiz* court; the later joint hearings and joint orders reflect an intent to *share* jurisdiction over the third-party complaint and supplement complaint rather than to transfer jurisdiction entirely. In *In re Clements*, we suggested that "minor or indirect" effects on the state's prison system were within the sphere of *Alberti*, and in addition, saved to *Alberti* "plaintiffs' several motions in that case for orders establishing a limit or 'cap' on the number of inmates confined in the Harris County jail facilities (either as a whole or as to individual units)." *In re Clements*, 881 F.2d at 153. These reservations suggest that the February 7 order fell within the realm reserved to the *Alberti* court. Reading *In re Clements* to preclude an *Alberti* order with *any* effect on the state would leave the *Alberti* court powerless to remedy the overcrowding in the county's jails, since ready-felons account for such a large percentage of the jails' population.

2. *Procedural due process.*

The state also makes a general due process argument, suggesting that the *Alberti* court erred in issuing the February 7 order without a hearing. Given the large number of hearings held in *Alberti*, it is difficult to take this argument seriously. At any rate, it is clear from the record that the order was the direct product of a hearing held on October 22, 1990. The ordering schedule for the October 22 hearing specifically announced that one of its purposes was to consider "the utilization of facilities in nearby counties which may have available jail space."

3. *The order of relief against the Texas Board of Pardons and Paroles.*

The state next argues that the *Alberti* court erred in ordering relief against the Texas Board of Pardons and Paroles because the Board was not named a party to the action. The state emphasizes that, under Texas law, the Board is an independent agency. *See* Tex.Const. Art. IV § 11; Tex.Code Crim.Pro. Art. 42.18 § 1. In 1989, however, the Texas Legislature abolished the Board and transferred its duties to the Department of Criminal Justice, successor to the Department of Corrections. *See* Tex.Gen. & Special Laws 1989, Reg. Sess., Ch. 785 § 1.20. Because the Board of Pardons and Paroles is now part of the Department of Criminal Justice, we find no error.

4. *The supplemental complaint.*

Finally, the state argues that the *Alberti* court erred in allowing the plaintiffs to file a supplemental complaint against the state after the liability trials. As the county and plaintiffs point out, however, the state was a party to the action, a third-party defendant, during the trial. The state contends that its trial strategy would have been different had it been an actual defendant, but it does not explain why. Because the state has not sufficiently demonstrated prejudice, we find no error.

5. *Pending motions.*

On April 23, 1991, the *Alberti* court entered an order continuing its February 27 order in effect through September 15, 1991. The state moved to vacate the order, and the *Alberti* court denied the motion on May 1, 1991. On May 9, 1991, the state noticed its appeal of the April 23 order and moved this court to consolidate its appeals. The plaintiffs joined the motion to consolidate the appeals, but the county moved the *Alberti* court to vacate the April 23 order on May 10, 1991, and argued that its motion to vacate rendered the state's appeal of the April 23 order premature. On May 20, 1991, the county conceded that its motion to vacate was untimely under Fed.R.Civ.P. 59(b), noticed its own appeal of the April 23 order, and requested that this court consolidate the appeals. Both the state and the county filed additional notices of appeal after the *Alberti* court denied the county's motion to vacate on June 4, 1991.

On May 28, 1991, the *Alberti* court entered an order requiring the sate to deposit an additional $1,000.000 with its registry by

June 10, 1991. The state moved to vacate the order on June 3, 1991, demanding an answer by June 4, 1991. On June 5, 1991, when the *Alberti* court failed to "promptly" respond to the motion to vacate, the state moved this court to stay the order, arguing that the *Alberti* court had "effectively" denied its motion to vacate. The state also noticed its appeal of the May 28 order and moved this court to consolidate its appeals. The county opposed the stay, arguing that the state's motion presented the very same issues rejected by this court when we denied the state's motion to stay the February 7 order.

We grant both motions to consolidate the appeals and adopt the briefs already filed. Finally, we grant the motion of the state to consolidate its latest appeal filed on July 10, 1991, and its most recent petition for writ of prohibition docketed under cause number 91-2801 with the above referenced appeals, and to adopt the briefs on file.

In sum, we remand the case for the limited purpose of allowing the district court to enter findings regarding the issue of deliberate indifference, now required by *Seiter*. We leave to the discretion of the district court whether to take additional evidence or conduct any further proceedings in that court regarding this issue. We stay the orders of the district court which are the subject of this appeal, pending the district court's findings regarding deliberate indifference. The stay will abide the district court's findings on the issue, vacating automatically, and without the need of a further order of this court should the district court find that the state was deliberately indifferent.

REMANDED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lawrence R. ALBERTI, et al.,
Plaintiffs-Appellees,

v.

The SHERIFF OF HARRIS COUNTY,
TEXAS, et al., Defendants-Third Party
Plaintiffs-Appellants, Appellees,

In re Ann RICHARDS, the Governor
of Texas, et al., Third Party
Defendants-Appellants.

Nos. 90-2441, 90-6034, 91-2274
91-2801, 91-2946 & 91-6101.

Appeals From the United States District Court for the Southern
District of Texas

ORDER DENYING PETITION FOR WRIT OF
PROHIBITION AND STAY
AND PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM and DUHÉ, Circuit Judges.

BY THE COURT:

The State of Texas has petitioned for panel rehearing and has also requested that we order the district court not to

disburse $2,000,000 deposited by the state in the registry of the court.

The state argues that the legislature, by enacting H.B. 93, and the parties by their settlement agreement, have changed the legal relationship between the state and counties in ways that require reconsideration of our earlier opinion and warrant a stay of any disbursal below. We are unpersuaded and deny both the application for stay or writ of prohibition and petition for rehearing.

First, we are not persuaded that the Texas Legislature attempted to speak to the historical relationship between the state and its counties in the handling of prisoners. The state argues that H.B. 93 made clear that the duty owed to the counties that we found was, in fact, never owed. The state points to the statutory language that: "The legislature declares that until September 1, 1995 the institutional division shall continue to perform its duty to accept inmates only as provided by the allocation formula established under § 499.071." H.B. 93, § 11.02 (emphasis supplied). The argument continues that this language "makes clear" that Texas counties have always had the duty to house prisoners contracted for by the state in this suit; that H.B. 93 is a legislative ratification of the Texas Department of Criminal Justice's interpretation of its and the county's liability.

H.B. 93 also provided, however, that the counties were to continue to perform their duty to confine and maintain inmates at the county's own expense until the date the inmate is accepted into the institutional division, unless the state suits were settled by written agreement. So, the word continue could describe a time from August 29 forward, or it could describe a legislative view of both current and past legal relationships.

The state also points to certain legislative history; that the legislation which failed in the first called session provided for the payment of costs of transferring inmates to other facilities

from February 7, 1991. That legislation failed when the Senate refused to concur. Relatedly, the state points out that there ware no appropriations for paying the costs of transfers made before those ordered by the Jails Standards Commission after October 1, 1991. The sum of these events, the state argues, is that the legislature did not intend that the state would pay for "earlier debt." And, of course, the state says we should not meddle, because to do so would step hard on principles of federalism. We find this argument unpersuasive.

The federal court orders addressing the liability of the state for certain county prisoners were a lion in the street when the Texas Legislature addressed the problem in August 1991. An effort by the state to undo those orders by a declaration of state law or otherwise would have presented its own set of problems. Under these circumstances, we are persuaded that if the Texas Legislature had intended the actions now claimed for it by the state's lawyers, it would have said so in clear language. We are not persuaded that the legislature would have left such a large undertaking to inference and innuendo. The same is true for the later "settlement", conspicuous for its silence over the obligations of the state for costs incurred before August 29, 1991.

The petition for writ of prohibition, stay and panel rehearing are DENIED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	C.A. NO H-72-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

ORDER

Pending are Plaintiffs' Motion for Emergency Supplemental Relief and State Defendants' Motion to Modify Final Order or to Stay Imposition of Fines. The Court has reviewed the pleadings and responses filed and has heard oral argument presented by counsel for all parties. State Defendants argue that they have made a good-faith effort to meet the March 31 deadline established in the September 29, 1992 Final Order, and the Court recognizes and applauds the activity undertaken by them in the last six months. State Defendants concede, however, that they have no plan which would alleviate the overcrowding in Harris County jail facilities before the end of 1993 and no recommendations regarding the overcrowding problem between now and that time.

The current conditions at the Harris County jail are barbaric and cannot be tolerated another eight or nine months. Inmates are sleeping on floors with backed-up sewage, are riding in dangerous elevators, and are being exposed to tuberculosis

and other diseases. Upon release, former inmates are exposing the general public in Harris and surrounding counties to highly-communicable diseases. As stated by the Monitors in their most recent findings of fact, "any extension of these conditions in the name of economy entails grave risks to the health and security of inmates and staff in the Jail, and to the broader community beyond the Jail."

The statistics, both total population and ratio of TDCJ-ready felons to total population, are staggering and continue to rise at an alarming rate. It is estimated that by 1998, the statewide backlog of TDCJ-ready felons housed in county facilities will exceed 35,000 inmates. Eighty percent of these will likely be housed in Harris County. The Harris County Jail Facility will eventually house more TDCJ inmates than almost any TDCJ facility. These TDCJ-ready felons are State inmates, and the citizens of Harris County should not be required to bear the health and financial burden of the State's responsibility to house its convicted felons.

Because of the egregious conditions caused by drastic overcrowding, caused in turn by the State's inability to accept its own prisoners, as well as the alarming rate of population growth at the Harris County facilities, the Court cannot and will not modify or stay the March 31, 1993 deadline.

For purposes of clarification, however, the Court notes that the provision in the September 29 order relating to a "fine" is more properly described as a sanction to be paid into the Court's Registry for appropriate use pursuant to orders of this Court to alleviate, as much as possible given the extreme overcrowding, the conditions at the Harris County facilities.

Based upon the foregoing and for the reasons stated orally by the Court at the conclusion of today's hearing, it is

ORDERED that Plaintiffs' Motion for Emergency Supplemental Relief is **DENIED**, and

ORDERED that State Defendants' Motion to Modify Final Order or, In the Alternative, to Stay Imposition of Fines is **DENIED**, except that the September 29 Final Order is clarified to reflect that the "fine" is more appropriately deemed a monetary sanction to be deposited into the Court's Registry for use in attempting to alleviate overcrowding and the resulting conditions at the Harris County Jail Facilities.

SIGNED this 23rd day of March, 1993, at Houston, Texas.

/s/
NORMAN BLACK
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiff,	§	
VS.	§	C.A. NO. 72-H-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

ORDER

IT IS HEREBY ORDERED that County Defendants' Fifth Motion to Require State Defendants to Deposit Funds is **GRANTED**, and it is further

ORDERED that State Defendants shall deposit into the Court's Registry, Account #72-1074-2, on or before December 4, 1992 the sum of $5,899,874.25, and it is further

ORDERED that within ten (10) calendar days of the deposit by State Defendants as directed herein, the Clerk shall issue a check drawn on the Court's Registry to Harris County, Texas, in the amount of $5,899,874.25 together with any and all interest accrued thereon and shall send said check to:

Harris County, Texas
c/o Harris County Attorney's Office
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-7164

SIGNED this 23rd day of November, 1992, at Houston, Texas.

/s/
NORMAN W. BLACK
CHIEF JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	C.A. NO H-72-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

FINAL ORDER

In accordance with the memorandum opinion signed this day, it is hereby

ORDERED

as follows:

(1) The County Defendants shall implement the Proposed Joint Plan. The full expense of all programs therein except those discussed in the memorandum opinion as falling within the traditional role of County detention facilities shall be paid by the State Defendants. The expense for these traditional County programs shall be paid by the County Defendants.

(2) The Monitors' Tentative Findings of Fact filed in June 1992 are adopted in their entirety as the findings of the Court.

(3) The County Defendants shall, at their own expense:

(a) Submit within 90 days of entry of this order for the review and approval of the Court a plan that will either bring the County Defendants into full compliance with the 9-9-7 provision of the Consent Decree or provide, through some alternative plan, sufficient staff to meet the security, classification, transportation, and other needs of all of the County's detention facilities, such plan to include funding arrangements and a schedule for implementation; and

(b) Submit within 30 days of entry of this order for the review and approval of the Court a comprehensive written medical plan; and

(c) Submit within 30 days of entry of this order for the review and approval of the Court a written plan for the immediate repair of the Central Jail ventilation system ("HVAC system"), together with definite arrangements for funding those repairs and an expedited renovation schedule; and

(d) Submit within 30 days of entry of this order evidence that the County Defendants have an adequate number of mattresses such that each inmate is provided with a mattress; thereafter, a fine of $50 per day per inmate shall be paid to the Court by the County Defendants for each inmate having to sleep on the floor without a mattress; and

(e) Submit within 90 days of entry of this order evidence that the kitchen equipment deficiencies described in the findings of fact have been remedied.

(4) The consent decree is modified to provide for a constitutional capacity for the Harris County Jail facility of 9800 inmates, 112.5% of design capacity. Specific population caps for each unit are as follows: 701 Building - 4500 inmates; 1301 Building - 3950 inmates; 301 Building - 475 inmates; and

Detention Center - 875 inmates. The population of the Harris County Jail facility shall be reduced to this new cap by no later than March 31, 1993. The State Defendants shall pay to the Court a fine of $50.00 per inmate over the cap per day after March 31, 1993 that the population in the Harris County facility exceeds 9800 inmates.

(5) Except as set forth in this order, the consent decree and all subsequent remedial orders are vacated.

(6) The Monitors' Fees incurred from February 1, 1989 shall be taxed ninety percent (90%) to the State Defendants and ten percent (10%) to the County Defendants. County Defendants shall submit within 14 days an affidavit memorializing those fees.

(7) The Court shall retain jurisdiction to resolve requests for attorneys fees and to ensure compliance with this final order.

THIS IS A FINAL ORDER.

SIGNED this 29th day of September, 1992.

/s/
JAMES DEANDA
Chief Judge
United States District Court

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	C.A. NO. H-72-1094
	§	
SHERIFF OF HARRIS COUNTY,	§	
et al.,	§	
Defendants.	§	
v.	§	
	§	
ANN RICHARDS, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION

Pursuant to Court Order the Defendants have filed a Proposed Joint Remedial Plan to correct constitutional deficiencies in the county jail facilities. Thereafter, the Special Master submitted his most recent periodic report, including findings, to which the Defendants have responded. The County Defendants have petitioned that the Monitor's fees and expenses be taxed against the State Defendants and the Court will now address these matters.

PRESENT INMATE POPULATION

The population of the Harris County Jail Facility continues to grow at an alarming rate. There are currently 14,500 Harris County and TDCJ-ready inmates in the Harris County facilities including those housed in outlying counties. As

of September 21, 1992, the population of the main jail was 6,455 compared to a design capacity of 3,505. There were some 1800 female inmates in Harris County. Perhaps the most significant statistic, however, is that 53% of the Harris County Jail Facility population is TDCJ-ready. The Court finds that the refusal of the State to accept its inmates is the principal cause of the current population crisis.

DEFENDANTS' PROPOSED JOINT REMEDIAL PLAN

As the Court directed, the State and County Defendants submitted a Proposed Joint Plan addressing the problem of overcrowding at the Harris County Jail Facility. In the past, Defendants' focus on assessing or avoiding blame rather than on resolving immediate and long-term problems has been counter-productive. Defendants note that this Plan, however, is the result of "a surprising and encouraging spirit of cooperation." The Court agrees. The current jail dilemma is the product of gross neglect and deliberate indifference to both then existing and readily predictable prison conditions of the predecessors of present state officials.

Several positive steps are contemplated by the state to alleviate unconstitutional conditions including:

(1) Acceleration of the review of alleged parole violations to reduce the time parolees spend in county jails awaiting determination; and

(2) Including in the allocation of prison space to the various counties, consideration of an inmate's risk to society. By this means a county having prisoners convicted of violent crimes might be allocated prison space originally designated for a county holding nonviolent offenders.

The Court recommends that the state consider developing a system of releasing parolees that would be equitable to the law abiding citizenry and more effective and

compatible with the goal of the parole system--rehabilitation with appropriate assistance and monitoring. Saturating densely populated metropolitan areas with the vast bulk of parolees is not the answer. Undeniably high recidivism rates among parolees under parole policies now in vogue have substantial impact on jail populations. A more even distribution of the risk of parole release under these circumstances will result in an increased statewide awareness and appreciation of the problems visited upon large metropolitan counties with a concomitant effect on the State Legislature.

STATE SENTENCES

The State Defendants and the Special Master have previously identified a preference of Harris County Judges for sentencing convicted felons to incarceration in the prison system. Understanding that rampant criminal activity is both a serious problem and a major political issue, the reality in Texas is that the prison system is nothing more than a revolving door. Each convicted felon sentenced to incarceration by the District Judges of Harris County results invariably in the expedited release of another convicted felon within the system. It is important to understand there is little control over which inmates must be released to make room for the new arrival. The released inmate may be someone who potentially posed a much greater risk to society than the newly sentenced inmate. However, the sentences imposed by the State District Judges in Harris County are within the legal limits established by the State Legislature. Consequently, having created the sanctions available to and utilized by State District Judges, the State must also provide the resources to carry out those sanctions.

Another immediate threat to society is posed by the potential release of inmates infected with tuberculosis, a highly infectious disease that has become a major public health problem in the nation's jails and prisons. Infected inmates leaving through the prison system's revolving door to make room for the new arrivals will carry the disease with them to be spread throughout

the community. The State's failure to meet its obligation to house convicted felons and the State District Court judges' refusal to give adequate consideration to alternative sentencing methods creates still another hazard to the citizenry.

EXPENSES OF IMPLEMENTATION OF THE JOINT PLAN

The defendants were unable to agree upon a fair distribution of the expenses involved in undertaking the various remedial programs described in the Plan. The Court finds that the primary responsibility, and therefore the primary financial burden, falls on the State. As the Court has previously noted, the County Defendants were approaching compliance with the orders of this Court until the State Defendants abdicated their responsibility for receiving convicted felons, leaving the inmates in the county jails indefinitely. It was at that point that the jail population began to soar.

This conduct on the part of the State will continue to result in unconstitutional overcrowding unless the State begins to identify, implement and fund necessary changes to its prison system. The parties' joint projection forecasts that by September 1995, the number of TDCJ-ready inmates in the Harris County Jail Facility will be 11,683, almost double the number of Harris County inmates in the facility. Harris County would house approximately 85% of the total 13,752 state-wide backlog of TDCJ-ready inmates, and would house more convicted felons than most TDCJ facilities.

Then, as now, the majority of problems identified by the Monitor at the Harris County facility result from the large number of TDCJ inmates which the State will not receive. For example, the extensive educational and vocational programs recommended by the Monitor are not constitutionally required in a traditional County detention facility where inmates are typically released in a relatively short time. Because the conduct of the State Defendants has converted the Harris County Jail into a major facility for convicted felons, such programs become

more important. The County should not, however, be forced to bear the expense of educating and providing job-training to the inmates which are TDCJ-ready but which the State will not accept.

Though the State Defendants repeatedly raise the provisions of House Bill 93 as evidence of their good faith efforts to address the serious overcrowding problems, the State has not utilized the primary remedies set forth in the legislation in a manner that will give adequate relief to the Harris County jail. The Court finds that the primary responsibility for the overcrowding crisis in the Harris County Jail Facility lies with the State Defendants who have the power and the ability through legislation to act to resolve the situation. The State has declined to do so. The Court will order that the provisions of the Proposed Joint Remedial Plan be implemented fully. The County will continue to fulfill its traditional role of providing a short-term detention facility and will implement at its expense pre-trial bond review, review of the practices and procedures associated with the processing of cases and inmates, review of felony bail practices, and recommendations to expedite PPT/PIA referrals and review of federal prisoners, undocumented aliens, and other categories of inmates in the jail facilities. The State must begin to accept its role of providing prison facilities for convicted felons and is ordered to provide funding for all other aspects of the Plan.

MONITORS' FINDINGS OF FACT

The monitors have submitted proposed findings of fact, to which the parties have filed written objections. Having reviewed the proposed findings and the objections, the Court determines that the findings are proper and should be adopted in their entirety.

CONSENT DECREE

The Court notes that notwithstanding encouragement from the Special Master to seek modification of the previously entered consent decree, the County Defendants have failed to move to modify. The Court also finds, however, that certain issues covered by the consent decree are now neither necessary nor desirable. Consequently, the Court in its final order will, sua sponte, modify the consent decree to eliminate all issues and requirements except as follows. Because the State Defendants were not parties to the consent decree, these remedial matters shall be at the expense of the County Defendants.

The County Defendants, while hiring extraordinary numbers of new employees, continue to be in non-compliance with the 9-9-7 staffing requirements of the consent decree. The Court finds that adequate staffing is mandatory to ensure compliance with the requirements of the United States Constitution. As a result, the final order shall require that the County Defendants, within 90 days of entry of that order, either reach full compliance with the 9-9-7 provision of the consent decree or present an alternative plan for approval by the Court.

Secondly, while the Court notes that the County Defendants have obtained certification of their medical facilities, the Court will require that the County submit within 90 days of entry of the final order a written medical plan.

The area which causes the most concern to the Court is the ventilation problem. This problem presents significant health risks to the entire population of Harris County and the surrounding areas, and it must be addressed immediately. Therefore, the County Defendants will be required to submit within 30 days of entry of the final order a written plan for the immediate repair of the Central Jail ventilation system, together with definite arrangements for funding those repairs and an expedited renovation schedule.

The Court is also concerned that the County Defendants are not providing mattresses to some inmates who are required

to sleep on the floor. While a bed may not be constitutionally required, forcing inmates to sleep on the bare floor without a mattress indicates a willful disregard of minimum constitutional standards. As a result, the final order will also require the County Defendants to obtain within thirty days a sufficient number of mattresses such that each inmate will be provided a mattress.

Finally, the Court finds that the condition of the kitchen equipment in the Harris County facilities, particularly the Central Jail, presents a significant health risk. Consequently, the final order will also require upgrading of the kitchen equipment deficiencies within 90 days.

CONSTITUTIONAL CAPACITY

The Court has also reviewed the capacity limitations from the consent decree and finds that they should be modified. Based upon the evidence presented in connection with the 701 Building, the Court believes that the Harris County facility can be maintained at a constitutional capacity of 112.5% of design capacity. The final order shall require that the population of the Harris County Jail facilities be at 9800 inmates, or 112.5% of design capacity, by March 31, 1993. The specific breakdown by facility is as follows: 701 Building - 4500 inmates; 1301 Building - 3950 inmates; 301 Building - 475 inmates; Detention Center - 875 inmates.

Additionally, because the Court has found that the population explosion in Harris County is primarily the result of the refusal of the State Defendants to accept TDCJ-ready inmates, the State Defendants shall pay to the Court a fine of $50 per person per day after March 31, 1993 that the population in the Harris County facilities exceeds the new cap.

ALLOCATION OF MONITORS' FEES

As previously stated discussed above, the Court finds that the primary cause of the overcrowding crisis in the Harris County Jail Facility is the State's refusal to accept its TDCJ-ready inmates. The Court does not, however, completely absolve the County Defendants from all responsibility. Accordingly, the monitors' fees incurred from February 1, 1989, the first month following the joinder of the State Defendants as parties to this suit, shall be allocated ninety percent (90%) to the State Defendants and ten percent (10%) to the County Defendants.

CONCLUSION

Based upon the foregoing, the State Defendants shall bear the expense of all programs in the Proposed Joint Plan except those discussed above as falling within the traditional role of County detention facilities. The expense for those traditional County functions shall be borne by the County Defendants.

Additionally, the Tentative Findings of the Monitors are adopted in their entirety as findings of fact. The consent decree shall be modified as discussed above, including a new constitutional capacity cap of 112.5% of design capacity. Should the new cap not be met by March 31, 1993, the State Defendants shall be required to pay to the Court the fine previously noted.

The Monitors' fees incurred from February 1, 1989 shall be apportioned 90% to the State Defendants and 10% to the County Defendants. The County Defendants shall be required to submit within 14 days an affidavit memorializing those fees.

The Court would note that its decision to require the State Defendants to bear primary responsibility for financing the Proposed Joint Plan and to pay a fine for excess inmates in the Harris County Jail Facilities after March 31, 1993 is not particularly satisfying. But early or accelerated release of prisoners is not the answer here nor should it be until all other

means of seeking compliance are exhausted. The Court, however, finds that it is the State Defendants who control the legislative mechanism for relieving the overcrowding problem and allocating the cost of that remedy. Unfortunately, the previous attempts by the state legislature to address these issues have been inadequate. Until such time as the legislature enacts a proper remedy and cost allocation, the federal court has no alternative but to rule on the case before it.

A final order consistent with this memorandum opinion shall be issued this day.

SIGNED this 29th day of September, 1992.

/s/
Judge DeAnda
Chief Judge
United States District Court

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL.,	§	
Plaintiffs,	§	
	§	
VS.	§	
	§	
THE SHERIFF OF HARRIS COUNTY,	§	
TEXAS, ET AL.,	§	
Defendants/	§	
Third Party Plaintiffs,	§	
	§	
VS.	§	C.A. #. 72-H-1094
	§	
ANN RICHARDS, ET AL.,	§	
Defendants/	§	
Third Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered the COUNTY DEFENDANTS' Motion to Withdraw $3,000,000 and All Accrued Interest on Deposit in the Court's Registry, and for Expedited Consideration, said $3,000,000 having been deposited by the State Defendants on December 17, 1991, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw

$3,000,000 and All Accrued Interest on Deposit in the Court's Registry, for the housing of and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $3,000,000 together with all the accrued interest thereon, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 20th day of February, 1992.

/s/
JAMES DEANDA
CHIEF JUDGE,
UNITED STATES DISTRICT COURT

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

ORDER

This case is before the Court on County Defendants' motion to extend the September 11, 1991 order and motion that the state defendants be required to deposit additional funds into the Court's registry. State Defendants have filed a written response to the motions. Because certain events outside the Court's control have delayed the entry of a permanent remedial decree as contemplated by the September 11 order, it is hereby

ORDERED

that the Court's order of September 11, 1991 is extended until altered by a subsequent permanent remedial order or other order of the Court. The Court notes that, pending a permanent remedial decree, its prior holding that the constitutional capacity of the jail facility is its design capacity continues in effect, establishing a current constitutional capacity of the Harris County jail facility at 8,698.

IT IS FURTHER ORDERED that the State Defendants shall deposit into the registry of the Court, fund 4:72cv1094-02,

on or before December 16, 1991, the sum of three million dollars ($3,000,000.00) from which the County Defendants shall be authorized to pay up to $40.00 per day for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas County detention facilities.

SIGNED this 25th day of November, 1991.

/s/
Chief Judge
United States District Court

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be heard COUNTY DEFENDANTS' Motion to Withdraw $2,000,000 and all accrued interest from the Court Registry, and for Expedited Consideration, said $2,000,000 having been deposited by the State Defendants on September 30, 1991, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw

$2,000,000 and all Accrued Interest from the Court Registry, for the housing of and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $2,000,000, together with all accrued interest thereon, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 25th day of October, 1991.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.,	§	
	§	
Defendants/ Third Party Plaintiffs,	§	
	§	
VS.	§	
	§	
ANN RICHARDS; ET AL.,	§	
	§	
Defendants/ Third-Party Defendants.	§	

ORDER

This case is before the Court on county defendants' second motion to require state defendants to deposit additional funds into the Court registry. The Court, after considering the motion filed herein, is of the opinion that the county defendants' motion should be granted. Accordingly, it is hereby

ORDERED that the county defendants' second motion to require state defendants to deposit additional funds into the Court registry is GRANTED, and state defendants are hereby

ORDERED to deposit $2,000,000.00 into the Court registry on or before September 30, 1991, from which the county defendants shall be authorized to pay up to $40.00 per diem for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas county detention facilities.

SIGNED this the 13th day of September, 1991, at Houston, Texas.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered COUNTY DEFENDANTS' Motion to Withdraw $1,000,000.00 and all accrued interest from the Court Registry, and for expedited Consideration, said $1,000,000.00 having been deposited by the State Defendants on August 12, 1991, and the Court, after considering the motion filed herein, if of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw

$1,000,000.00 and all accrued interest from the Court Registry, for the housing and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $1,000,000.00, together with all accrued interest, on STATE DEFENDANTS' deposits of $750,000.00 and $1,000,000.00 into the Registry of the Court, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 13th day of September, 1991.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION
	§	NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered COUNTY DEFENDANTS' Motion to Withdraw $750,000.00 from the Court Registry, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw $750,000.00 from the Court Registry, for the housing and caring for prisoners ready for transfer to TDCJ-ID, all of whom were

transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $750,000.00, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 7th day of August, 1991.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
	§	
SHERIFF OF HARRIS COUNTY, et al.,	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND ORDER

This case is before the Court on remand from the United States Court of Appeals for the Fifth Circuit for findings regarding the issue of deliberate indifference on the part of the State and/or County defendants as now required under Wilson v. Seiter, _____ U.S. _____, 59 U.S.L.W. 4671 (June 17, 1991). Because of the emergency nature of the current overcrowding and medical conditions in the Harris County jail facilities, the Court considers it imperative that these findings be made immediately. Consequently, having reviewed the record in this case, the Supreme Court opinion in Wilson v. Seiter, and the July 25, 1991 opinion of the Fifth Circuit, the Court finds that the State defendants' and, to a much lesser degree, the County defendants' awareness of the extremely cruel conditions in the county facilities and their failure to take steps to remedy those conditions constitutes deliberate indifference as required by Seiter. The Court notes however, that the new County jail facility is scheduled to open next month. Once that facility becomes operational, the Court will revisit the issue of whether the

County defendants have any continuing liability in this case or whether they have taken all possible steps to correct the overcrowding and medical care problems in the Harris County jail system.

In accordance with the July 25 opinion of the Fifth Circuit, all prior orders of this Court which were previously stayed pending appeal are again in full force and effect upon entry of this order. Therefore, State defendants are directed to deposit within 48 hours of receipt of this order one million dollars ($1,000,000.00) into the Registry of the Court, fund 4:72cv1094-02. Additionally, the data and reports required by the Court's order of July 8, 1991 are due on or before August 12. As previously ordered by the Court, the parties are admonished that timely compliance with prior orders of the Court is imperative.

IT IS SO ORDERED.

SIGNED this 7th day of August, 1991.

/s/ James DeAnda
Chief Judge
United States District Court

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, et al., Defendants.	§	

ORDER

In accordance with the orders of this Court entered February 7, 1991, March 15, 1991 and April 23, 1991, it is hereby

ORDERED

that the State Defendants shall deposit into the registry of the Court, fund 4:72cv1094-02, on or before June 10, 1991, the sum of one million dollars ($1,000,000.00) from which the County Defendants shall be authorized to pay up to $40.00 per day for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas County detention facilities.

SIGNED this 28th day of May, 1991.

/s/
JAMES DEANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, TEXAS, ET AL.,	§	
	§	
Defendants,	§	
	§	
VS.	§	
	§	
WILLIAM P. CLEMENTS, ET AL.,	§	
	§	
Third-Party Defendants.	§	

ORDER

The Court's current remedial order of February 7, 1991, as modified on March 15, 1991, remains in effect only until May 1, 1991, also the date on which oral argument is scheduled before the United States Court of Appeals for the Fifth Circuit on the various petitions and appeals filed in this case. So that the appellate court may know the intended course of this Court's continued remedy, it is important that the next order be issued promptly.

As of April 15, 1991, the population of the Harris County detention facilities was 7,565, or 1,265 over the cap imposed in the February 7, 1991 Order. The State defendants deposited $750,000.00 in the Registry of the Court on April 2, 1991. Since then, the County defendants have transferred only 250 convicted felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) to other county jails. Another 120 prisoners are scheduled for transfer during the week of April 15, 1991, but it is reportedly unlikely that the County defendants will be able to transfer more than 360 prisoners by the end of April, leaving the total population some 1,200 prisoners over the cap at the expiration of the current order on April 30, 1991. The County defendants, thus, have failed to comply with the terms of the February 7, 1991 Order, as amended on March 15, 1991.

The County defendants cite the difficulties of completing legal and financial arrangements for the ordered transfers, especially in light of the uncertainty over funding which was not resolved until April 1, 1991, and report that they are ready to transfer up to 1,500 prisoners in May, if required to do so.

It is necessary to repeat the warnings contained in the Court's March 15, 1991 Order. When that order was issued, the overall population of the Harris County detention facilities stood at 7,376, or 157 percent of their design capacity; now, it is at 7,565, or 161 percent of the design capacity. This present total exceeds by 1,565 that number of prisoners the Alberti monitor and the State defendants' expert testified could be managed safely and securely for even a limited period of time. These population figures are approaching crisis proportions. As noted on March 15, 1991: "We are talking here about life and death, and the most fundamental rights of the plaintiff class." The danger to the plaintiffs has grown, not diminished, over the past two months.

In the meantime, the State appellate court has not yet decided pending litigation over the allocation of responsibility

and costs for the maintenance of felons ready for transfer to TDCJ-ID in county detention facilities, nor has the State legislature dealt definitively with that issue. At the same time, the Fifth Circuit is now reviewing the various pending petitions and appeals in this case.

In accordance with the foregoing, it is ORDERED:

1. That the remedial decree entered in this case on February 7, 1991, as modified on March 15, 1991, shall remain in effect until September 15, 1991. The State defendants shall be required to deposit in the Registry of the Alberti Court additional deposits when the Court is notified by the County defendants that the original $750,000.00 deposited by the State defendants on April 2, 1991 is exhausted, unless the Fifth Circuit directs otherwise after its consideration of the parties' petitions and appeals.

2. As before, the Court specifically retains jurisdiction over this matter.

SIGNED this 22nd day of April, 1991, at Houston, Texas.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al.,	§	Civil Action No. 72-H-1094
Defendants, and Third-Party Plaintiffs,	§	
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

MEMORANDUM OPINION

On February 7, 1991, the Honorable James DeAnda, Chief Judge of the United States District Court for the Southern District of Texas, as the sitting judge in this action, entered an order, part of which directed the State third-party defendants to deposit in the registry of the Alberti court $750,000.00, to be used to pay the costs of detaining in other county detention facilities some of Harris County's overflow inmates who have been sentenced to the Texas Department of Criminal Justice - Institutional Division. In response to that order, the State defendants filed its motion to vacate or to stay the order, directing its motion both to Judge DeAnda and to myself, as the sitting judge in Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended

in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).[1]

As I explained in the memorandum opinion I filed contemporaneously with Judge De Anda's February 7 Order, I did not join with that portion of the order relating to the deposit of $750,000.00, for two reasons. First, I noted that I had not been directed to any portion of the record, developed before Judge DeAnda in Alberti, which relates to whether or how an order requiring the State to pay $750,000.00 into the court registry will affect the State's ability to comply with the orders entered in Ruiz. Without an appropriate reference to the record in that respect, I could not determine whether that specific party of the relief ordered would fall within the category of matters arising out of the Alberti litigation which the Fifth Circuit, in In re Clements, transferred to the Ruiz court. Second, I explained that if the question whether Texas law requires the State to bear the costs of confining some of Harris County's overflow Institutional Division-ready inmates were placed before me, my understanding of principles of abstention would lead me to refrain from ruling on it.

In regard to the pending motion of the State defendants, I should make two observations. First, because I did not join in entering the order to which the State's motion is addressed, I cannot properly grant the relief the State defendants now seek. See Gallimore v. Missouri Pac. R. Co., 635 F.2d 1165, 1171-72 (5th Cir. 1981). Second, with regard to the question whether or how requiring the State to pay $750,000.00 into the registry of the Alberti court would affect the State's ability to comply with Ruiz, I take note of the excerpts from the testimony in Alberti of David McNutt, Assistant Director for Budget and Managing Services for the Institutional Division of the Texas Department of Criminal Justice, attached as exhibit D to the State's motion,

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[1] After the Governor of the State of Texas, the Director of the Texas Department of Corrections, the members of the Texas Board of Corrections, and the State of Texas were made third-party defendants in the Alberti action, the Court of Appeals for the Fifth Circuit directed the transfer to the Ruiz court of "so much of the relief portion of the third-party complaint [in Alberti] as seeks an injunction ordering [the State defendants] to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." In re Clements, 881 F.2d 145, 154 (5th Cir. 1989) (emphasis in original).

which is incorporated herein by reference. After consideration of that testimony, I conclude that the State's ability to comply with the orders entered in Ruiz will be endangered by the requirement that it pay $750,000.00, and possibly more, for the detention of some of Harris County's overflow Institutional Division-ready inmates. To be specific, I find that this aspect of the relief ordered against the State defendants likely will adversely affect their ability to operate and manage TDCJ-operated confinement facilities in such manner as to comply with the Ruiz decree. I would note that I do not find any other aspect of the relief Judge DeAnda has directed in the February 7 order to conflict in any way with the provisions of the Ruiz decree.

SIGNED this 15th day of March, 1991.

/s/
William Wayne Justice
United States District Judge

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. H-72-1094
JOHNNY KLEVENHAGEN; ET AL.,	§	
	§	
Defendants.	§	

ORDER

The State defendants in this case have sought to vacate or stay the Court's remedial order signed February 7, 1991, while the plaintiffs and the County defendants seek a number of modifications to the same order.

The State's motion to vacate or stay the order is DENIED. According to the most recent statistics provided by the County defendants to the parties and the Court, the population of Harris County detention facilities on Monday, March 11, 1991, was at 7,376 prisoners or 157 percent of the design capacity of those facilities. This number exceeds by 1,376 the number of prisoners the Alberti monitors and the State defendants' own witness testified could be managed safely and securely for even a limited period of time. These population figures are beginning to approach these numbers that led to the outbreak of a respiratory, pneumococcal epidemic that struck down dozens of inmates and claimed two lives in mid-1989. We

are talking here about life and death, and the most fundamental rights of the plaintiff class.

The February 7, 1991 order carefully refrained from actions with a direct and substantial effect on the Texas prison system. In In re Clements, the Fifth Circuit transferred to the Ruiz court only "so much of the remedy portion of the Alberti third-party action as seeks to enjoin them to receive or take prisoners into TDC confinement (or to otherwise take action in the operation or management of TDC-operated confinement facilities)." 881 F.2d 145, 153 (5th Cir. 1989). A requirement that the State defendants provide funds to underwrite tentatively the transfer of felons to other county jails represents no departure from the Fifth Circuit's directive. As understood by this Court, the Fifth Circuit did not immunize the State defendants from contributing in any form to the remediation of unconstitutional conditions for which they have been found liable.

This Court's February 7, 1991 order did not impose final responsibility on the State for the cost of any transfers required pursuant to the Order. Rather, that Order expressly recognized that the allocation of responsibility and costs for the maintenance of felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) was an issue in litigation currently pending in the State courts and that the outcome of that litigation will determine any appropriate final accounting for these costs in this case. That the February 7, 1991 order included a preliminary assessment at all was due to the fact that other Texas counties could not be expected to receive felons ready for transfer to TDCJ-ID from Harris County without advance payment. Representatives of the Sheriff's Department have testified that counties contacted by the County defendants refused to consider any transfers from Harris County without the promise of immediate payment. There is, then, no issue of abstention here, nor, ultimately, are Eleventh Amendment and Pennhurst principles raised by the Court's February 7, 1991 order, which, while seeking to address immediate and critical constitutional deficiencies, left to State courts any final

accounting. Given all of these circumstances, it is hard to identify another case in which the burden of suffering irreparable and substantial harm rests more clearly on the party opposed to the movant. The State defendants' motion to delay further the relief of unconstitutional conditions in Harris County detention facilities is DENIED.

In response to the motions of the plaintiffs and the County defendants, the following modifications to the February 7, 1991 order are adopted:

1. Paragraph 1 of that order is amended to read:

> This remedial decree supersedes all previous remedial orders in this case that conflict with the terms of this order, and shall remain in effect until May 1, 1991.

2. Paragraph 2 of the February 7, 1991 order which reads:

> The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall cap, the County population shall not exceed 4,725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1,575, or 25 percent of the overall population.

is amended to read as follows:

> The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall

> cap, the County population shall not exceed 4,725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1,575, or 25 percent of the overall population. In any event, the total population of Harris County detention facilities shall not exceed 6,300 for more than seven consecutive days without triggering the transfer provisions of this order.

3. That portion of paragraph 3 of the February 7, 1991 order which reads:

> If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of from five to no more than 15 years in groups of 25 inmates to other Texas County detention facilities identified and selected by the Sheriff.

is amended to read as follows:

> If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of five or more years to such other Texas County detention facilities that meet the minimum standard of the Texas Commission on Jail Standards and are identified and selected by the Sheriff. Transfers made pursuant to this provision shall be conducted once weekly.

4. That portion of paragraph 4 of the February 7, 1991 order which reads:

> The County defendants shall file a bond for $750,000.00 with the Registry of the Alberti Court by March 20, 1991 in the event that the State defendants prevail on the issue of cost allocation in the pending State litigation.

is amended to read as follows:

> The County defendants shall file with the Registry of the Alberti Court by March 20, 1991 a resolution adopted and passed by the Commissioners Court of Harris County that the County "is financially able to and has adequate resources from which to pay $750,000.00 in the event State defendants ultimately prevail on the issue of cost allocation."

5. Paragraph 6 of the February 7, 1991 order is amended to read as follows:

> The County defendants shall staff and occupy the new boot camp at the Detention Center in Humble by May 1, 1991 and the residential probation program in the 701 Building by September 1, 1991.

All other modifications sought by the parties to the February 7, 1991 order are DENIED.

SIGNED this 15th day of March, 1991, at Houston, Texas.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX T

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al., Defendants, and Third-Plaintiffs,	§	Civil Action No. 72-H-1094
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

MEMORANDUM OPINION

I write separately to clarify my relationship to the relief set forth in the order entered contemporaneously herewith by the Hon. James DeAnda, Chief Judge of the United States District Court for the Southern District of Texas, as the sitting judge in Lawrence R. Alberti, et al. v. the Sheriff of Harris County, Texas, et al., civil action No. 72-H-1094, with which I have only one point of disagreement.

My connection with the Alberti litigation arises from my position as sitting judge in Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). After the Governor of the State

of Texas, the Director of the Texas Department of Corrections, the members of the Texas Board of Corrections, and the State of Texas were made third-party defendants in the Alberti action, the Court of Appeals for the Fifth Circuit directed the transfer to the Ruiz court of "so much of the relief portion of the third-party complaint [in Alberti] as seeks an injunction ordering [the state defendants] to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." In re Clements, 881 F.2d 145, 154 (5th Cir. 1989) (emphasis in original).

While the relief Judge DeAnda now orders clearly is within the scope of Alberti, one aspect of the order seemingly falls within the category of matters within the purview of the Ruiz court. After directing the transfer to other county detention facilities of some of Harris County's overflow inmates who have been sentenced to the Texas Department of Criminal Justice - Institutional Division, Judge DeAnda directs that "[t]he State defendants shall deposit in the Registry of the Alberti court $750,000.00 by March 20, 1991, from which the County defendants shall be authorized to pay $40.00 per diem for each transferred inmate." I have not been directed to any portion of the evidence in Alberti which relates to whether or how an order requiring the State to pay $750,000.00 into the court registry will affect the State's ability to comply with the orders entered in Ruiz. Without an appropriate record in that respect, I cannot agree to that specific part of the relief ordered.

I also would note that if the question whether Texas law requires the State to bear the costs of confining some of Harris County's overflow Institutional Division-ready inmates were placed before me, my understanding of principles of abstention would lead me to refrain from ruling on it. The issue underlying the cost question is the relative responsibilities of the state and the counties for Institutional Division-ready detainees. The matter plainly is one of substantial public concern. Furthermore, developments in the law of Texas relating to the issue indicate that the question is an unsettled one.

First of these developments is Tex.Rev.Civ.Stat.Ann. art. 6166a-4 (Vernon 1991), which became effective March 20, 1990, and which directs the Texas Board of Criminal Justice to establish a formula for allocating the number of inmates that each Texas county can transfer to the Institutional Division each week. The statute requires the Board to consider factors which "shall include but are not limited to:"

(1) the percentage of prison admissions for the entire state that were used by the county or counties in the preceding 12 months;

(2) the percentage of the state's violent index crime that occurred in the county or counties in the preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county or counties in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act that occurred in the county or counties in the 12 preceding months;

(5) the percentage of the state's population residing in the county or counties; and

(6) the percentage of the state's total unemployment in the county or counties.

Tex.Rev.Civ.Stat.Ann. art. 6166a-4(a).

The statute directs the Board to consider waiving the allocation formula for a county "(1) that experiences a rapid increase in persons convicted of felonies for reasons other than traditional sentencing practices in the county; or (2) in which the jail inmate population exceeds the approved capacity of the county's jail facility, as established by the Commission on Jail

Standards." Tex.Rev.Civ.Stat.Ann. art. 6166a-4(c). Such modifications of the allocation formula are prohibited, however, after November 30, 1990. Tex.Rev.Civ.Stat.Ann. art. 6166a-4(e).

It seems plain that in setting a limit on the number of prisoners each county can transfer to the Institutional Division, the Texas legislature intended that the county remain responsible for detaining those inmates it cannot transfer because it has filled its weekly allocation. To make the state responsible for Institutional Division-ready detainees in excess of a county's allocation would render the allocation process meaningless. Similarly, in the present action, to require the state to pay the cost of detaining Harris County's excess Institutional Division-ready inmates in other county detention facilities would appear to effectively override the allocation the Board of Criminal Justice has established for Harris County in accordance with the statute.

The second development pertinent to the issue at hand, of which I take judicial notice, is the decision in County of Nueces, Texas v. Texas Board of Corrections, et al., No. 452,071 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas) (Hart, J.). Construing Texas law before the enactment of art. 6166a-4, the court held that the state has a duty to reimburse counties for the costs incurred by detaining inmates who are ready for transfer to the Institutional Division. See partial summary judgments, filed April 18, 1989, and September 9, 1989. In a subsequent ruling, Judge Hart held that the enactment of art. 6166a-4 did not affect his holding in the case. See judgment, filed August 22, 1990. The court's decision currently is on appeal before the Third Judicial District Court of Appeals at Austin. Though not a party to the Nueces action, Harris County has filed an action in the same court seeking the same relief ordered in Nueces. Harris County v. State of Texas, et al., No. 475,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas).

The third matter of importance for the question presented here, of which I also take judicial notice, is the introduction into the Texas House of Representatives of House Bill 13, filed November 12, 1990, which would require the state to reimburse counties for the costs a county incurs by confining inmates who have been sentenced to the Institutional Division. Counties would be repaid not only such costs as they are incurred in the future, but also the amounts expended from September 1, 1989, until the date the act becomes effective. Thus, if enacted in its present form, the Bill would require the state to reimburse Harris County for the costs at issue here.

Perhaps the most important consequence of the introduction of House Bill 13 is that the question presented here will be resolved in the very place it should be decided, the Texas legislature. Its introduction also adds support to the conclusion that Texas law does not at present require the state to pay the cost of detaining a county's Institutional Division-ready prisoners. At the very least, the state's duty to pay such costs is not a settled matter of Texas law.

These three developments, taken together with other considerations, suggest that the proper course for this court is to abstain from deciding whether Texas law requires the state to reimburse Harris County for costs incurred in confining Institutional Division-ready inmates at other county detention facilities. New Orleans Public Serv. v. Council of New Orleans, 109 S.Ct. 2506 (1989), contains recent teaching from the Supreme Court concerning the circumstances in which abstention is proper. After discussing the Court's decisions in Burford v. Sun Oil Co., 319 U.S. 315 (1943) and Alabama Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341 (1951), Justice Scalia, writing for seven members of the court, stated:

> From these cases, and others on which they relied, we have distilled the principle now commonly referred to as the "Burford doctrine." Where timely and adequate state review is available, a federal court sitting

> in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;' or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

109 U.S. at 2514.

The question presented here falls squarely into the first category in which the New Orleans Court would find Burford-type abstention proper. To require the state to pay the cost of detaining Harris County's excess Institutional Division-ready inmates would "interfere with the proceedings or orders" of the Texas Board of Criminal Justice in establishing Harris County's allocation of transfers to the Institutional Division, in accordance with art. 6166a-4. The issue presents a difficult question of Texas law, and certainly is one that bears on a policy problem of substantial public import whose importance transcends the result in the case at bar, as to the legal point in contention here. The policy problem underlying the cost question presented here is the relative responsibilities of the Institutional Division and the counties for detention of Institutional Division-ready inmates in excess of each county's allocation. While the issue whether the state or Harris County should bear the costs of alternative detention for overflow Harris County prisoners obviously is significant, it is less important than the underlying policy problem, which has state-wide ramifications.[1]

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[1] The second category of Burford-type abstention to which the New Orleans opinion refers is that where repeated decisions by the lower federal courts concerning a subject matter of public concern would frustrate state efforts to establish a coherent policy with regard to that matter. See Burford v. Sun Oil, Co., supra, 319 U.S. at 326-31. The present action does not

In several cases, the Supreme Court has endorsed or ordered abstention by the federal district court upon facts similar to those presented here. Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968), involved claims concerning water use which turned on the meaning of "public use" under the New Mexico Constitution. The district court decided the claims, and the Court of Appeals rejected a motion to stay the federal court's action until the state law issues could be settled in a declaratory judgment suit then pending in state court. 391 U.S. at 593-94. The Supreme Court reversed, stating:

> The Court of Appeals erred in refusing to stay its hand. The state law issues which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

391 U.S. at 594.

In Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), as in the case at bar, conflicting indications

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precisely fit this category, because actions like the one at bar are not likely to frequently recur. On the other hand, rendering a decision here likely would cause the same type of harm the Burford Court sought to avoid, that is, it would disrupt the state's efforts to establish a coherent, state-wide policy concerning the relationship between the Institutional Division and the county jails.

concerning a question of state law rendered the federal district court unable to determine with confidence how the highest court of the state would decide the issue before it. 360 U.S. at 30. Because the matter, involving the law of eminent domain, was one of substantial public concern, the Court upheld the district court's decision to abstain from deciding the case until the state supreme court had had an opportunity to rule on the question. 360 U.S. at 28-31. In explaining its decision, the Court noted:

> [W]e have held that the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of a state court action. Meredith v. Winter Haven, 320 U.S. 228, 236. But where the action touched upon the relationship of City to State, Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, . . . we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.

360 U.S. at 27-28.

In Fieldcrest Dairies, to which the Thibodaux Court refers, a company that marketed milk in the city of Chicago applied for a permit to sell milk in paper containers. Because a city ordinance required milk sold in quantities less than one gallon be delivered in standard milk bottles, the city board of health refused to grant the permit. The company brought an action in the federal district court, seeking a declaratory judgment that the ordinance did not prohibit the sale of milk in paper containers, or, in the alternative, that such a prohibition would be unconstitutional and invalid. During the pendency of the action, the Illinois legislature enacted the statute regulating the sale of milk, which arguably conflicted with the Chicago city ordinance. 316 U.S. at 169-70.

While the district court and the court of appeals decided the case on the merits, the Supreme Court reversed, holding that the lower courts should have abstained from adjudicating the case. Noting that the Illinois courts and legislature would have the final say as to the meaning of the ordinance in question and as to the alleged conflict between the ordinance and the statute, the Court stated, "The determination which the District Court, the Circuit Court of Appeals, or we, might make could not be anything more than a forecast -- a prediction as to the ultimate decision of the Supreme Court of Illinois." Because the law in question was unsettled, and because "the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State," the Court found that

> [t]he delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' reemphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. As we said in the Pullman case, 'The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision' and any 'needless friction with state policies.'

316 U.S. at 172 (citations omitted).

The same concerns counsel abstention here.

As noted above, Harris County has instituted in the Travis County district court an action seeking relief which would include recovery of the costs at issue here. Harris County v. State of Texas, et al., No. 475,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas). It is well established that the pendency of a parallel state court action does not in itself require the federal court to abstain. See, e.g., Moore v. Sims, 442 U.S. 415, 423 n.8 (1979). But the prosecution of that action ensures that Harris County will have "timely and adequate state court

review" of the cost issue in question here. See New Orleans Public Serv. v. Council of New Orleans, supra, 109 S.Ct. at 2514. Similarly, the introduction of House Bill 13 does not require abstention, but the fact that the Texas legislature apparently will address the question now at bar increases the desirability of abstention by a federal court from deciding the issue.

Both in practical terms and under the provisions of art. 6166a-4, Institutional Division-ready detainees in excess of a county's weekly allocation of transfers to the Institutional Division remain in custody of the county. I am cognizant, then, that to abstain from deciding the cost issue presented here would require, for the present, that Harris County continue to bear the expense of confining those inmates it cannot transfer to the Institutional Division, including any such prisoner the Alberti court orders the County to transfer to other county detention facilities. I would not now hold that Texas law imposes no duty on the state to pay the costs a county incurs in detaining Institutional Division-ready prisoners in excess of a county's weekly allocation. Rather, because I believe that the matter poses a "difficult question[] of state law bearing on policy problems whose importance transcends the result in the case at bar," New Orleans Public Serv. v. Council of New Orleans, supra, 109 S.Ct. at 2514, I would abstain from deciding the issue.

SIGNED this 7th day of February, 1991.

/s/
William Wayne Justice
United States District Judge

Supreme Court, U.S.

No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

Ann Richards, Governor of Texas; Carol S. Vance, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Clarence N. Stevenson, Allan B. Polunsky, R. H. Duncan, Sr., Gilberto Hinojosa, John R. Ward, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
Appendices U-II

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APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al., Defendants/Third-Party Plaintiffs,	§	C. A. No. 72-H-1094
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

ORDER

Since early 1990, the combined Courts* have searched for some feasible and equitable solution to the overcrowding problem in Harris County detention facilities. After the Alberti Court found conditions in those facilities unconstitutional and both the State and County defendants liable for such conditions, the combined Courts supervised lengthy negotiations among the

*In August, 1989, the U. S. Court of Appeals for the Fifth Circuit issued a writ of mandamus directing the coordination of remedies in the instant case with prior directives of the federal district court in Ruiz v. Lynaugh, 503 Fed. Supp. 1265 (S.D. Tex. 1980); In re William P. Clements, et al., No. 89-2706 (1989). Pursuant to those directions, the Alberti and Ruiz courts have conducted joint hearings on remedial issues and in the Alberti case and issued joint remedial orders.

parties and conducted lengthy hearings on proposed remedial plans. On April 5, 1990, the Courts entered a remedial order imposing a series of progressively reduced caps on the population of the Harris County detention facilities. The order directed the State defendants to remove from Harris County facilities a specific number of convicted felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) and provided for automatic awards of administrative good time to certain limited classes of convicted felons if the State defendants failed to remove the specified number of prisoners. The order also provided for the releases of convicted misdemeanants and pre-trial detainees, commencing with those least likely to pose a threat to public safety, if the County defendants failed to reduce the number of County prisoners to prescribed levels.

That April order lapsed on August 31, 1990, by which time the State defendants had removed the required number of felons ready for transfer to TDCJ-ID. The number of County prisoners exceeded the applicable cap by 254 inmates on August 31, 1990, and releases of pre-trial detainees and misdemeanants occurred in early September. Meanwhile, after further hearings, the combined Courts entered a new remedial order on September 7, 1990. This order extended the existing overall population cap of 6,100 prisoners on the Harris County detention facilities to December 31, 1990, when a further reduction to 6,000 was required. The order also imposed internal caps on the State and County, with the State being limited to 1,350 felons ready for transfer to TDCJ-ID and the County being limited to a total of 4,750 prisoners. As in the previous order, the new mandate provided for expedited awards of good time to accelerate the release on parole of felons and ordered the direct release of certain pre-trial detainees and misdemeanants if the parties were unable to meet their respective internal caps.

Since neither set of defendants was able initially to meet its internal cap, both sought a stay from the combined Courts,

while the State defendants also sought prematurely a stay from the Fifth Circuit Court of Appeals. Hearings before the Alberti Court followed, during which State and County defendants argued for a moratorium on any further releases and sought additional time to develop alternatives other than releases for dealing with the excess population. On October 24, 1990, the combined Courts, without ruling on the defendants' applications for a stay, ordered the parties to meet with the Special Master in the Alberti and Ruiz cases and attempt to generate some acceptable plan for dealing with the population problem that did not rely on releases.

During September and October, 1990, meanwhile, the State and County defendants had expedited their cooperative work on developing, funding and implementing programs for intermediate, alternative sanctions pursuant to House Bill 2335, passed by the Texas Legislature in 1989 to encourage the development of local correctional programs and facilities for felons traditionally sentenced to TDCJ-ID. In early November, the defendants reported significant progress in the development of these programs and the Alberti Court granted the defendants a further extension of 50 days on November 19, 1990 within which to attempt to implement sufficient alternative program plots to reduce the number of felons committed to TDCJ-ID in Harris County detention facilities.

While a substantial number of programs for intermediate sanctions has been created in the intervening 60 days, State District Court judges have only begun to integrate them into regular sentencing patterns. While there has been some reduction in the number of felons committed weekly to Harris County detention facilities for delivery to TDCJ-ID, that number continues to exceed the number of felons removed from Harris County detention facilities weekly through transfer to TDCJ-ID or released on parole by an average of some 50 prisoners. According to statistics provided to the court by the County defendants through the Special Master, the total population of prisoners in Harris county detention facilities on January 21,

1991 was 6,715, 715 prisoners over the currently applicable overall population cap of 6,000. With the excess of commitments over removals running at an average of 50 a week, we can anticipate a monthly increase in total population of some 215, assuming, of course, that the County defendants manage to hold their numbers in check. If that rate of growth continues, we are looking at numbers in excess of 7,300 within the next 50 days, unless steps are taken forthwith to limit or reduce the population. In hearings in August, 1990, both the Alberti Special Master and the State defendants' expert testified that Harris County detention facilities could probably be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000. Even more alarming is the specter that, if the current numbers continue unabated, the County prisoner population will exceed the County's design capacity within 30 days of the opening of its new 4,000-bed 701 Building scheduled to be ready for occupancy on September 1, 1991.

In the long term, probably the best hope for County and State defendants alike is a rapid expansion in the utilization of intermediate sanctions developed pursuant to HB 2335. The Count defendants have proven themselves capable of creating the programs needed for such sanctions, but the reluctance of State District Court judges to use them is beyond the reach of the federal court in this case. But let no one be misled by the consequences of sate judges' preference for prison sentences and their disregard for alternative sanctions. It is no great blow for law and order to send so many offenders to prison that the only way the State can handle them is to accelerate their release. Present policies and practices are making a mockery of criminal sanctions and churning people through the prison system so rapidly, there is scarcely any sanction at all. The result is the increasingly widespread erosion of public confidence in the criminal justice system. The furor last September over releases in Harris County was simply symptomatic of a much deeper, growing public anger.

The State defendants, meanwhile, after earlier appealing the November 19, 1990 Order that gave parties an additional 60 days to develop alternatives, have now filed a motion seeking to extend that same order. February marks the 39th month, dating from September, 1988 since the Alberti Monitors identified the overflow of felons ready for transfer to TDCJ-ID as a serious problem contributing substantially to unconstitutional conditions in Harris County detention facilities. The time for further delay has passed and the State defendants' motion is denied.

The next construction milestone for the County defendants comes at the end of April, 1991, when they are due to open a boot camp for 382 prisoners and a residential probation facility for 192 convicted offenders. Recognizing the State and County defendants' efforts to expand both the implementation and use of intermediate sanctions pursuant to HB 2335, the need to avoid further direct releases or releases accomplished through the further acceleration of parole; and the existence of pending litigation in the state courts over the allocation of responsibility and costs for the maintenance of felons ready for transfer to TDCJ-ID in county detention facilities. What is called for is a short-term remedial decrees that is designed to bridge the gap between the present and the next construction milestone, which leaving room for the State and County defendants to continue and expand their present separate and joint efforts to contain their respective populations, but one that also sets some limits on immediate overall population growth and provides tools for addressing continued overcrowding. None of the remedial measures encompassed in this order affect the population cap imposed on TDCJ institutions as a result of the various orders and agreements in the Ruiz case, nor do they require the supersedence of the statutorily-based allocation formula adopted by the State defendants to protect the integrity of the Ruiz orders and agreements.

It is therefore ORDERED:

1. This remedial decree supersedes all previous remedial orders in this case, and shall remain in effect until May 1, 1991.

2. The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall cap, the County population shall not exceed 4725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1575, or 25 percent of the overall population.

3. If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of from five to no more than 15 years in groups of 25 inmates to other Texas county detention facilities identified and selected by the Sheriff. Any such felons transferred to other county detention facilities shall continue to be Harris County prisoners until they are released on parole in absentia (PIA), or moved to a pre-parole transfer program (PPT) or transferred to TDCJ-ID under Harris County's weekly allocation.

4. The State defendants shall deposit in the Registry of the Alberti Court $750,000.00 by March 20, 1991, from which the County defendants shall be authorized to pay up to $40.00 per diem for each transferred inmate. The county expenditures shall be reimbursed from this fund upon application to the court and upon approval and order of payment by the court. If this initial fund is exhausted prior to the expiration of this Order, the Court shall direct such additional deposits as may be necessary to carry out the terms of the Order. The County defendants shall pay the costs of transportation. If the County population exceeds its internal cap of 4,725 prisoners, the County defendants shall be required to pay the per diem cost for each prisoner in excess of the 4,725-cap on any one day,

although only TDCJ-ID-ready felons shall actually be transferred. Thus, for example, if the County population on a given day is 4,750, the County defendants shall be responsible for paying the per diem for 25 of the TDCJ-ID ready felons transferred to other county jails on that day.

This assessment of costs is tentative and preliminary and shall be reevaluated and finalized contingent on (1) the outcome of pending litigation in State courts over the allocation of costs for maintaining felons ready for transfer to TDCJ-ID in county facilities; and (2) the extent to which HB 2335 alternatives are implemented in Harris County and the number of felons committed to TDCJ-ID is reduced. The County defendants shall file a bond for $750,000.00 with the Registry of the Alberti Court by March 20, 1991 in the event that the State defendants prevail on the issue of cost allocation in the pending State litigation.

5. The County defendants shall continue to be required to do everything necessary to occupy the new 701 building by September 1, 1991. They shall continue to provide funding for and conduct the recruitment, hiring and training of staff to operate the 701 Building. The County defendants shall be assessed a substantial daily fine for each day beyond September 1, 1991 they fail to occupy the 701 Building. "Occupy" in this context refers to the housing of a substantial number of prisoners, not a token contingent.

6. The County defendants shall staff and occupy the new boot camp at the Detention Center in Humble and the residential probation program in the 701 Building by April 15, 1991.

7. The County and State defendants shall continue to cooperate to expand and implement intermediate sanctions pursuant to HB 2335. The County defendants shall take all measures required to keep State District Court judges knowledgeable about the nature and availability of these sanctions.

8. Between the date of the entry of this order and May 1, 1991, the State defendants shall maintain the current allocation formula for admissions to TDCJ-ID pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to TDCJ-ID shall apply to all additional capacity that becomes available during the period covered by this order. The State defendants may take any other steps consonant with State law and federal court orders to reduce the TDCJ-ID ready population in Harris County detention facilities.

9. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potentially eligible for parole in absentia (PIA) or pre-parole transfer (PPT) together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from courts or prosecutors. The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days subject to the availability of PPT beds.

10. The Court specifically retains jurisdiction over this matter.

SIGNED this 7th day of February, 1991, at Houston, Texas.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
vs.	§	
JOHNNY KLEVENHAGEN, et al.,	§	C. A.
	§	No. 72-H-1094
Defendants.	§	
vs.	§	
WILLIAM P. CLEMENTS, et al.,	§	
Third-Party Defendants.	§	

ORDER

On April 5, 1990, the Court entered a remedial order in this case that established an immediate cap of 6,700 inmates at the Harris County detention facilities, and caps of 6,400 by May 15, 1990, and 6,100 by August 31, 1990. That order imposed an obligation on the State defendants to take a specific number of prisoners ready for transfer to the Texas Department of Criminal Justice - Institutional Division (TDCJ-ID) and provided that if the State defendants failed to take that number of prisoners, automatic awards of administrative good time would be made to certain carefully limited classes of convicted felons. Likewise, the order provided for releases of certain categories of convicted misdemeanants and pre-trial detainees, commencing with those least likely to present a threat to the public safety, in the event

that the mandated steps by the County defendants failed to reduce the number of prisoners to levels specified in the order.

As a consequence of that order, the number of prisoners held in Harris County detention facilities was substantially reduced, without the necessity of making any awards of administrative good time. On August 13, 1990, the total population of Harris County detention facilities was 6,097, or 30 percent over their design capacity. The number of felons ready for transfer to TDCJ-ID fell from 3,420 on July 31, 1989 to 1,069 on July 31, 1990. The total smaller population, moreover, occupied increased cellspace, because the newly renovated 301 Building opened on December 2, 1989, raising the capacity of Harris County detention facilities by 417 to a new total of 4,698 beds.

On August 14 and 15, 1990, the Court held hearings to review the defendants' progress in meeting the requirements of the April 5, 1990 Order and consider whether and what further remedial actions might be appropriate. The County defendants informed the court that its latest construction project, the so-called 701 Building, a cold storage warehouse in downtown Houston currently being converted into a 4,000-bed jail, and a new central intake center for the processing of all prisoners on entry into Harris County Sheriff's Department, will be ready for occupancy by September 1, 1991. This date is critical in this case because these new facilities will permit the County to handle up to 8,698 prisoners, which, in combination with programs for alternatives to incarceration being developed under House Bill 2335, portends an end to the correctional crisis that has plagued Harris County for over 15 years.

The problem the court must address now is how best to bridge the next 12 months. The Special Master in the Alberti case testified that, while some further population reductions are necessary, the County's institutions could probably be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000. The State defendants' expert witness concurred. The task then is to assure first that the

September 1991 target date for the opening of the 701 Building is fixed firmly and irrevocably and, second, to keep the population of Harris County detention facilities within acceptable limits for the next 12 months. Accordingly, the following remedial measures are hereby ordered and directed:

1. The County defendants shall occupy the new 701 Building by no later than September 1, 1991. They shall provide funding for, and begin, the recruitment, hiring and training of staff to operate the 701 Building by no later than September 30, 1990. The County defendants shall be assessed a substantial daily fine for each day beyond September 1, 1991 they fail to occupy the 701 Building. "Occupy" in this context refers to the housing of a substantial number of prisoners, not a token contingent.

2. Upon the entry of this order, the overall population of Harris County detention facilities shall not exceed 6,100 prisoners.

3. The overall population of Harris County detention facilities shall be reduced to 6,000 by December 31, 1990.

4. The population of prisoners ready for transfer from Harris County detention facilities to TDCJ-ID shall not exceed 1,350 between the entry of this order and September 1, 1991. For the purpose of this order, a prisoner ready for transfer to TDCJ-ID is an individual who has been convicted of a felony and sentenced, and whose immediate transfer to TDCJ-ID would be in compliance with section 8 of article 42.09 of the Texas Code of Criminal Procedure.

5. Between the date of the entry of this order and September 1, 1991, the State defendants shall maintain the current allocation formula for admissions to TDCJ-ID pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to TDCJ-ID shall apply to all additional capacity that becomes available during the period covered by this order.

6. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potentially eligible for parole in absentia (PIA) or pre-parole transfer (PPT) together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from courts or prosecutors. The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days subject to the availability of PPT beds.

7. Whenever the number of prisoners in Harris County detention facilities ready for transfer to TDCJ-ID exceeds 1,350 for 15 consecutive days, awards of administrative good time pursuant to this order shall be made only to those prisoners in Harris County detention facilities ready for transfer TDCJ-ID who have already been identified as eligible for consideration for either PIA or PPT, and whose names and paperwork have been submitted by the County defendants, other than the following: (1) prisoners who are serving a sentence for an offense for which the judgment contains an affirmative finding under Subdivision (2) of Subsection (a) of section 3g, article 42.12, Texas Code of Criminal Procedure; (2) prisoners who are serving a sentence for an offense listed in one of the following sections of the Texas Penal Code: (A) section 19.02 (murder); (B) section 19.03 (capital murder); (C) section 19.04 (voluntary manslaughter); (D) section 20.03 (kidnapping); (E) section 20.04 (aggravated kidnapping); (F) section 21.11 (indecency with a child); (G) section 22.011 (sexual assault); (H) section 22.021 (aggravated sexual assault); (I) section 22.03 (deadly assault on law enforcement or corrections officer or court participant); (J) section 22.04 (injury to child or an elderly individ-

ual); (K) section 25.02 (incest); (L) section 25.06 (solicitation of a child); (M) section 25.11 (sale or purchase of a child); (N) section 28.02 (arson); (O) section 29.02 (robbery); (P) section 29.03 (aggravated robbery); (Q) section 30.02 (burglary), if the offense is punished as a first degree felony under that section; (R) section 43.04 (aggravated promotion of prostitution); (S) section 43.05 (compelling prostitution); (T) section 43.24 (sale, distribution, or display of harmful material to minor); (U) section 43.25 (sexual performance by a child); (V) section 46.11 (deadly weapon in penal institution); (W) section 15.01 (criminal attempt), if the offense attempted is listed in this paragraph; (X) section 15.02 (criminal conspiracy), if the offense that is the subject of this conspiracy is listed in this paragraph; or (Y) section 15.03 (criminal solicitation), if the offense solicited is listed in this paragraph; and (3) prisoners who are serving a sentencing for an offense listed in section 4.03(c) or 4.032(c) (aggravated manufacture or delivery of a controlled substance), section 4.04(c), 4.041(c), 4.042(c), or 4.043(c) (aggravated possession of a controlled substance), section 4.05 (delivery of marijuana) if the offense is punished under Subsection (b)(5) of that section, section 4.05(c) (aggravated delivery of marijuana), or section 4.051(c) (aggravated possession of marijuana) of the Texas Controlled Substance Act (article 4476-15, Vernon's Texas Civil Statutes).

In the event that awards of administrative good time are required to achieve the limit on the number of prisoners ready for transfer to TDCJ-ID in Harris County detention facilities, sufficient administrative good time shall be awarded to eligible prisoners to reduce the number of such prisoners to 1,350 within a reasonable time. If the initial award of administrative good time does not suffice to reduce the number of prisoners awaiting transfer to TDCJ-ID to 1,350 within a reasonable time, additional increments of administrative good time shall continue to be awarded to all eligible prisoners until the required cap has been reached. The Alberti Special Master shall apprise the court if awards of administrative good time are required by this paragraph and shall recommend the number of days to be

awarded. Any awards shall be ordered by the Alberti court. The State and County defendants shall cooperate to develop an orderly process for the identification of prisoners eligible for additional good time and provide that information to the Special Master. The State and County defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, the acceleration of administrative good time as directed in this paragraph fails to achieve the required cap.

8. The population of prisoners in Harris County detention facilities, exclusive of those ready for transfer to TDCJ-ID, shall not exceed 4,750 between the entry of this order and December 31, 1990, or 4,650 between January 1 and September 1, 1991.

9. The County defendants may utilize expanded use of release on recognizance and their pre-trial services agency, extensive use of electronic monitoring and drug testing programs for pre-trial detainees, or the implementation of alternative community corrections programs pursuant to the provisions of House Bill 2335 to remove county prisoners from Harris County detention facilities and ameliorate overcrowded conditions.

10. Whenever the population of Harris County detention facilities, exclusive of prisoners ready for transfer to TDCJ-ID, exceeds 4,750 between the entry of this order and December 31, 1990 or 4,650 between January 1 and September 1, 1991 for 15 consecutive days, the Alberti Special Master shall make sufficient releases to meet the then-applicable cap. In making releases, the Special Master shall operate, first, to reduce any potentialy adverse impact of such releases on public safety and, second, to maximize the impact of releases on actual population reductions. Releases shall be made in order of those least likely to create danger to the community in the opinion of the Special Master, and choices among the categories of those released will be based on the impact of projected releases on the actual population. Among the categories of County prisoners the Special Master shall consider for release are misdemeanant pre-

trial detainees who are not charged with a felony; pre-trial detainees charged with a third degree felony who have scored six or seven points on their pre-trial services interview and are not charged with another felony; Class C misdemeanants held in lieu of the payment of court costs/fines; Class A and B misdemeanants serving court costs/fines; and parole violators arrested on a so-called "Blue Warrant" for the technical violation of parole conditions rather than a new criminal charge. In addition, if necessary to meet the cap, the Special Master may award sufficient increments of daily good time to convicted Class A and B misdemeanants to accomplish the needed releases. The County defendants shall cooperate fully with the Special Master in the conduct of all such releases and provide whatever logistical support he may need to carry out his duties pursuant to this provision. The County defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, through the releases and acceleration of good time directed in this paragraph, the caps required by this order are not achieved.

11. The State and County defendants shall cooperate to implement as quickly as possible a plan, pursuant to the provisions of House Bill 2335, designed to reduce the population of the Harris County detention facilities in order to minimize the need for awards of good time and early releases of prisoners. To this end, all provisions of paragraph 6 of the court's order of April 5, 1990 shall continue in full force and effect.

12. Based on information to be provided by the Alberti Special Master, the court will review on a quarterly basis the actions taken pursuant to this order and the impact of those actions on the level of population in the Harris County detention facilities to determine whether this order is having its intended effect and whether any modification is required.

13. The court specifically retains jurisdiction over this matter.

Done in Houston, Texas this 6th day of September, 1990.

/s/
James DeAnda
Chief Judge
United States District Court
Southern District of Texas

/s/
William Wayne Justice
United States District Judge
United States District Court
Eastern District of Texas
Sitting by Designation

APPENDIX W

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
THE SHERIFF OF HARRIS COUNTY, et al.,	§	
	§	
Defendants/Third-Party Plaintiffs,	§	C. A. No. 72-H-1094
	§	
v.	§	
	§	
WILLIAM P. CLEMENTS, et al.,	§	
	§	
Third-Party Defendants.	§	

ORDER

On September 25, 1989, the court entered Findings of Fact and Conclusions of Law relating to the unconstitutionality of conditions in Harris County detention facilities and the liability of the State and Count defendants for such conditions. After lengthy negotiations among the parties over proposed remedies for dealing with overcrowding and unconstitutional conditions, the subsequent submission by the parties of remedial plans and a lengthy hearing on the propose remedial plans conducted before the undersigned judges, a remedial order was

entered on March 15, 1990. Since that date, the parties have filed motions that have brought to our attention the need to clarify certain provisions in that order and, in one minor respect, to modify the prior order. It should be emphasized that these clarifications and the minor modification in no manner depart from the intent of the court when it entered its March 15 order. In order to avoid misunderstanding, the order of March 15, 1990 will be vacated and this order will be entered in its place, nunc pro tunc. Accordingly, the following remedial measures are hereby ordered and directed:

1. Upon the entry of this order, the overall population of Harris County detention facilities shall not exceed 6,700 prisoners.

2. The overall population of Harris County detention facilities shall be reduced to 6,400 prisoners by May 15, 1990, and shall be reduced to 6,100 prisoners by August 31, 1990. These objectives shall be achieved by actions of the State defendants and the County defendants, as set forth below.

3. Between February 1, 1990 and August 31, 1990, the State defendants shall cause at least 9,130 prisoners ready for transfer from Harris County detention facilities to the Institutional Division of the Texas Department of Criminal Justice (formerly the Texas Department of Corrections, and referred to hereafter as "the Institutional Division"), as defined below, to be removed from the Harris County detention facilities.

4. For the purpose of this order, a prisoner ready for transfer to the Institutional Division is an individual who has been convicted of a felony and sentenced, and whose immediate transfer to the Institutional Division would be in compliance with section 8 of article 42.09 of the Texas Code of Criminal Procedure.

5. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potenti-

ally eligible for parole in absentia (PIA) or pre-parole transfer (PPT), together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from the courts or prosecutors.

The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days, subject to the availability of PPT beds.

6. The County defendants have submitted a plan, pursuant to the provisions of House Bill 2335, portions of which propose alternative facilities and programs for convicted felons traditionally transferred to the Institutional Division who are, or will be, kept in Harris County. The County defendants' plan shall be reviewed expeditiously by appropriate State officials. If approved, the State defendants shall immediately take all steps that are necessary and within their authority to provide funding to the County for the implementation of the plan, through a request for budget executions or other means. The State defendants will not be obligated, however, to provide funding for such purpose in excess of the monetary limits established pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4, and in determining whether any advance of funds is required pursuant to a budget execution, the State defendants may take into account the ability of the County defendants to fulfill their obligations under the plan during the period for which any accelerated funding may be requested.

7. During the period covered by this order, the State defendants shall maintain the current allocation formula for admissions to the Institutional Division as adopted by the Board of Criminal Justice on January 29, 1990 pursuant to Tex. Rev.

Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to the Institutional Division shall remain constant with respect to both current Institutional Division facilities and such Institutional Division facilities as may come on line and be ready for occupancy by prisoners during the period covered by this order.

8. On May 31, 1990, the Sheriff of Harris County shall notify the court of the number of prisoners ready for transfer to the Institutional Division who were removed by the State defendants from the Harris County detention facilities between February 1 and May 31, 1990. On August 31, 1990, the Sheriff of Harris County shall notify the court of the number of prisoners ready for transfer to the Institutional Division who were removed by the State defendants from the Harris County detention facilities between June 1 and August 31. If the State defendants have not removed 4,565 prisoners from the Harris County detention facilities between February 1 and May 31, 1990, or a total of 9,130 prisoners from the Harris County detention facilities by August 31, 1990, awards of administrative good time pursuant to this order shall be made to prisoners in Harris County detention facilities ready for transfer to the Institutional Division who have been identified already as eligible for consideration for either PIA or PPT, and whose names and paperwork have been submitted by the County defendants, other than the following: (1) prisoners who are serving a sentence for an offense for which the judgment contains an affirmative finding under Subdivision (2) of Subsection (a) of section 3g, article 42.12, Texas Code of Criminal Procedure; (2) prisoners who are serving a sentence for an offense listed in one of the following sections of the Texas Penal Code: (A) section 19.02 (murder); (B) section 19.03 (capital murder); (C) section 19.04 (voluntary manslaughter); (D) section 20.03 (kidnapping); (E) section 20.04 (aggravated kidnapping); (F) section 21.11 (indecency with a child); (G) section 22.01 (sexual assault); (H) section 22.021 (aggravated sexual assault); (I) section 22.03 (deadly assault on law enforcement or corrections officer or court participant); (J) section 22.04 (injury to child or an elderly

individual); (K) section 25.02 (incest); (L) section 25.06 (sale or purchase of a child); (M) section 25.06 (solicitation of a child); (N) section 28.02 (arson); (O) section 29.02 (robbery); (P) section 29.03 (aggravated robbery); (Q) section 30.02 (burglary), if the offense is punished as a first degree felony under that section; (R) section 43.04 (aggravated promotion of prostitution); (S) section 40.05 (compelling prostitution); (T) section 40.24 (sale, distribution, or display of harmful material to minor); (U) section 43.25 (sexual performance by a child); (V) section 46.11 (deadly weapon in penal institution); (W) section 15.01 (criminal attempt), if the offense attempted is listed in this paragraph; (X) section 15.02 (criminal conspiracy), if the offense that is the subject of this conspiracy is listed in this paragraph; or (Y) section 15.30 (criminal solicitation), if the offense solicited is listed in this paragraph; and (3) prisoners who are serving a sentence for an offense listed in section 4.03(c) or 4.032(c) (aggravated manufacture or delivery of a controlled substance), section 4.04(c), 4.041(c), 4.042(c), or 4.043 (c) (aggravated possession of a controlled substance), section 4.05 (delivery of marijuana) if the offense is punished under Subsection (b)(5) of that section, section 4.05(c) (aggravated delivery of marijuana), or section 4.051(c) (aggravated possession of marijuana) of the Texas Controlled Substance Act (article 4476-15, Vernon's Texas Civil Statutes).

In the event that awards of extra administrative good time are required to achieve the removals required of the State defendants, 30 days of administrative good time shall be made to eligible prisoners. If the initial award of 30 days of administrative good time does not suffice to produce the required number of removals, 30-day increments of administrative good conduct time shall continue to be awarded to all eligible prisoners until the number of required removals has been accomplished. The State defendants shall not be in contempt of this order if, despite compliance with all aspects of this order, the acceleration of administrative good time as directed in this paragraph fails to produce a sufficient number of prisoners eligible for release through PIA or PPT to accomplish the number of required

removals. The Special Master in this case shall apprise the court if any awards of administrative good time are required by this paragraph, in which event such awards shall be ordered by the Alberti court upon recommendation of the Special Master. The State and County defendants shall cooperate to develop an orderly process for the identification of prisoners eligible for additional good time and provide that information to the Special Master.

9. Not later than ten days following the entry of this order, the Sheriff of Harris County shall file a report with the court setting forth the total number of inmates in Harris County detention facilities, who are not ready for transfer to the Institutional Division, as of the date of entry of this order. This number shall include pre-trial detainees, county prisoners, Class C misdemeanants, parole violators, bench-warrant prisoners, fugitives, civil district court detainees, federal prisoners, immigration prisoners, inmates convicted and sentenced to less than ten years whose cases are on appeal under authority of Tex. Code Crim. Pro Ann. art. Ë42.09, Ë4 and convicted and sentenced inmates with multiple indictments whose trials are not completed.

10. Commencing on the date of this order, the County defendants shall ensure that the population of inmates in Harris County detention facilities, who are not ready for transfer to the institutional Division, is maintained at a level that will permit the achievement of the objectives of paragraph 2 of this order. The County defendants may meet this obligation through a variety of self-initiated means, including, for example, an expedited, critical review of their present pre-trial detainee population, in conjunction with the County and State judiciary, to remove detainees determined to be eligible for release on personal bond; the introduction and use of the electronic monitoring and drug testing programs for pre-trial detainees; implementation of community corrections programs pursuant to the provisions of House Bill 2335; or any other feasible and appropriate measures.

11. On May 31 and August 31, 1990, the Sheriff of Harris County shall notify the court of the total number of inmates in Harris County detention facilities. If, despite the adoption of the voluntary measures described in paragraph 10, above, the total number of inmates exceeds 6,400 on May 15 despite the State defendants' compliance with paragraphs 3, 5, and 8 of this order, or the total number of inmates exceeds 6,100 on August 31 despite the State defendants' compliance with paragraphs 3, 5, and 8 of this order, the Alberti Fact-Finding Master shall release misdemeanor pre-trial detainees, first releasing those charged with the lowest category of offense, provided that no misdemeanor detainee shall be released who is also charged with a felony. If the mandated population reduction requires the release of one or more pre-trial detainees charged with a particular category of offense, all of the eligible members in that category shall be released. If the release of misdemeanor pre-trial detainees does not suffice to produce the required reduction, the Fact-Finding Special Master shall next release pre-trial detainees charged with a third degree felony who score a six or seven on their pre-trial services interview, and who are not also charged with another felony offense. If the release of misdemeanor and third degree felony pre-trial detainees does not suffice to produce the required reduction in population, the Fact-Finding Special Master shall release Class C misdemeanants held in lieu of the payment of court costs/ fines. Releases within this category shall be based on the amount of the costs/fines to be served, with those having the least costs/fines to serve being released first. If meeting the mandated reduction requires the release of one or more offenders in a particular category, all of the eligible members in that category shall be released. Thus if two releases are required to meet the quota, but there are six incarcerated misdemeanants serving only one day in lie of costs/fines, all six are to be released. If the release of Class C misdemeanants serving costs/fines does not suffice to produce the required reduction, the Fact-Finding Special Master shall release Class A and B misdemeanants serving court costs/fines. Releases in this category, again, shall be based on the amount of the costs or fines to be served, with those having the least costs

or fines being released first. If the release of Class C misdemeanants serving fines and Class A and B misdemeanants serving costs/fines does not suffice to produce the required reduction, the Fact-Finding Special Master shall award sufficient increments of daily administrative good time to Class A and B misdemeanants serving County time to accomplish the number of releases required. If more than the number of inmates needed to meet the required reduction are eligible for release based on the award of a specific amount of good time, all inmates made eligible by the award of good time shall be released. The Fact-Finding Special Master shall continue to award daily increments of administrative good time to prisoners serving County time and make releases in the order prescribed above until the number of inmates in Harris County detention facilities reaches the levels required by paragraph 2 of this order to be accomplished by May 15 and August 31. In directing the foregoing releases, the Fact-Finding Special Master shall operate with a view to reducing the potentially adverse impact of such releases on public safety; releases shall be made in order of those least likely to create a danger to the community in the opinion of the Special Master. The County defendants shall not be liable for proceedings in contempt of this order if, despite compliance with all aspects of this order, through the acceleration of good time and releases directed in this paragraph, an insufficient number of prisoners is identified and released to meet the reductions mandated by this order.

12. The court specifically retains jurisdiction over this matter.

IT IS HEREBY ORDERED that the court's order of March 15, 1990, be and hereby is vacated.

DONE in Houston, Texas this 5th day of April 1990, nunc pro tunc March 15, 1990.

/s/
James DeAnda

Chief Judge
United States District Court
Southern District of Texas

/s/
William Wayne Justice
United States District Judge
Eastern District of Texas
Sitting by Designation

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.	§	
	§	
	§	
VS.	§	
	§	
WILLIAM P. CLEMENTS; ET AL.	§	
	§	

ORDER

The Court ORDERS that County Defendants' motion to amend or supplement the findings and conclusions entered September 25, 1989, or, in the alternative for a new trial is DENIED.

SIGNED in Houston, Texas, this 23rd day of October, 1989.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Y

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL.	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
JOHNNY KLEVENHAGEN, ET AL.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case presents a triad of pending matters aimed at vindicating the rights of inmates presently incarcerated in the Harris County Jail facilities. First, Plaintiffs have filed series of motions[1] requesting supplemental relief against the Sheriff of Harris County and the Harris County Commissioners Court (County Defendants). Second, County Defendants have filed a third-party action against various state officials (State Defendants)[2] alleging that the state officials are liable to them

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[1] Plaintiffs' pending motions are: (1) Plaintiffs' motion to modify the Courts' November 8, 1988 Order, or, in the alternative, for an additional interim order (filed January 11, 1989); (2) Plaintiffs' motion for supplemental relief establishing population limits on the Harris County detention facilities (filed February 17, 1989); (3) Plaintiffs' motion for additional supplemental relief establishing population limits on the Harris County detention facilities (filed May 30, 1989); (4) Plaintiffs' motion for additional supplemental relief requesting additional jail staff assistants for the monitors, and good time credits (filed May 30, 1989); and (5) Plaintiffs' motion for a temporary restraining order and preliminary injunction (filed September 11, 1989).

[2] State Defendants are the following state officials who control the admissions policy and population levels of the Texas Department of Corrections (TDC): William P. Clements, Governor of the State of Texas;

for all or part of Plaintiffs' claims against the county relating to conditions of confinement in the Harris County Jail. In particular, County Defendants claim that the State Defendants' refusal to accept all convicted felons ready for transfer into the Texas Department of Corrections (TDC) is the primary cause of unconstitutional conditions of confinement in the Harris County Jail. Third, in response to the Court's suggestion, Plaintiffs have filed a motion for leave to file a supplemental complaint against the State Defendants already joined as third-party defendants by County Defendants.[3]

Trial to the bench on County Defendants' third-party complaint commenced on August 14, 1989 and concluded on August 18, 1989. At the conclusion of evidence, the Court took the matter under advisement and requested post-trial briefs on certain issues. The Court subsequently held a hearing on Plaintiffs' request for supplemental relief from September 12, 1989 through September 15, 1989. Now, after reviewing the record, the testimony and credibility of the witnesses, and the applicable law, the Court concludes, as is more fully set forth in the findings of fact and conclusions of law below, that State Defendants and County Defendants are liable for the unconstitutional conditions of confinement presently existing in the Harris County Jail facilities.

James Lynaugh, Director of TDC; Charles T. Terrell, Chairman of the Texas Board of Corrections; and Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann, and Jerry H. Hodges, Board Members on the Texas Board of Corrections.

[3] Actually, Plaintiffs seek to join several additional state officials who were not previously joined as third-party defendants by County Defendants. The additional state officials include the board members of the Texas Board of Pardons and Paroles as well as two board members of the new Texas Board of Criminal Justice who were not included in County Defendants' list of the members of the previous Texas Board of Corrections. Moreover, Plaintiffs have attempted to name the State of Texas as a defendant. The list of state officials Plaintiffs seek to join presents problems that the Court will more fully address below.

PROCEDURAL HISTORY

On August 14, 1972, Lawrence R. Alberti and others filed a class action against County Defendants pursuant to 42 U.S.C. § 1983 claiming that conditions of confinement in the Harris County Jail facilities violated their statutory and constitutional rights. Two and a half years later, in February of 1975, the parties agreed to, and this Court entered, a consent judgment. The consent judgment required County Defendants, inter alia, to provide sufficient funds to increase jail capacity, to provide sufficient guards to assure safety without relying on inmate assistants, and to provide adequate medical, dental, and rehabilitative services to the inmates. The Court retained exclusive jurisdiction to issue interim orders necessary for relief in the action.

Not long after the February, 1975 consent decree was entered, Plaintiffs filed a motion for supplemental relief alleging: that County Defendants had failed to implement a viable pre-trial release program, and that the amount of financing committed to the construction of new facilities was wholly inadequate. After conducting a six-day evidentiary hearing on Plaintiffs' motion and touring the jail facilities, the Court issued a lengthy and detailed supplemental remedial order. See Alberti v. Sheriff of Harris County, 406 F.Supp. 649 (S.D. Tex. 1975).

Ultimately, the Court approved County Defendants' plans for the construction of a new central jail and a staffing plan that required County Defendants to provide at least one guard per forty-five inmates at the new facility. In August of 1983, Plaintiffs filed a motion for contempt, alleging that County Defendants had never succeeded in complying with the staffing order. After conducting a lengthy evidentiary hearing, the Court found the conditions existing within the jail to be unconstitutional and entered yet another supplemental remedial order regarding minimum staffing levels at the jail facilities. See Alberti v. Sheriff of Harris County, 600 F.Supp. 443 (S.D. Tex. 1984), aff'd 790 F.2d 1220 (5th Cir. 1986).

After the Court appointed special masters in 1987 to monitor County Defendants' compliance with the Court's remedial orders, it appeared that a spirit of cooperation between Plaintiffs and County Defendants would eventually lead to full compliance with all Court orders with a minimum of direct judicial intervention. However, during 1988, TDC's refusal to accept all convicted felons ready for transfer from the jail prevented County Defendants from fully complying with this Court's orders.

By early November of 1988, the overcrowded conditions in the jail facilities had reached crisis proportions. After considerable negotiations among Plaintiffs, the Special Master, and County Defendants, the parties presented a proposed order to the Court at a November 4, 1988 hearing[4] that would require the Sheriff to transport to TDC each week at least 250 male and 40 female convicted felons who were ready for transfer. Three days later, Plaintiffs filed an unopposed motion for interim emergency relief that requested the entry of the proposed order discussed at the November 4 hearing. On November 8, 1988, the Court signed the requested order.[5]

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[4] The November 4 hearing had been previously set to consider the more mundane problem of establishing a budget for the Special Master. The Court received notice that the parties wanted to discuss the entry of the proposed order only one day prior to the hearing.

[5] In its August 11, 1989 opinion on State Defendants' petition for a writ of mandamus, the Court of Appeals incorrectly, yet understandably, concluded that this Court entered the November 8, 1988 Order sua sponte. See, In re: William P. Clements, No. 89-2706, Slip Opinion at p. 5 (5th Cir. 1989). In fact, the unopposed motion for interim emergency relief (instrument number 896 in file). Although Plaintiffs' motion was received by the Clerk's Office on November 7, 1988 (as indicated by a stamp on the

(footnote continued on next page)

(footnote continued from previous page)

reverse side of the last page of the proposed order that was attached as an exhibit to the motion), through clerical error, the motion was not "filed" until December 7, 1988.

Despite the Court's November 8, 1988 order, TDC refused to accept any convicted felons beyond the 182 felons it agreed to accept each week according to its "scheduled admissions policy." Without TDC's cooperation, the Sheriff was unable to comply with the Court's November 8, 1988 order. Therefore, on December 12, 1988, County Defendants filed a motion to stay the November 8, 1988 order and a motion asking the Court to require Plaintiffs to join the appropriate TDC officials as defendants pursuant to Fed. R. Civ. P. 19(a) and 21. Plaintiffs opposed County Defendants' motion to stay, and, although Plaintiffs agreed that TDC officials should be joined as parties, they had no desire to amend their complaint to add TDC officials as defendants.[6] Instead, Plaintiffs sought to have the noncooperating TDC officials held in contempt for interfering with the Sheriff's ability to comply with the November 8, 1988 order.

After conducting a conference on January 12, 1989, the Court granted the Sheriff's motion to stay the November 8, 1988 order, denied Plaintiffs' suggestion of contempt, [7] and denied County Defendants' motion to require Plaintiffs to join TDC officials as defendants. However, the Court granted County Defendants leave to join the appropriate state officials as third-party defendants pursuant to Fed. R. Civ. P. 14(a).

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[6] Plaintiffs argued that if TDC officials were to be joined, County Defendants should join them as third-party defendants pursuant to Fed. R. Civ. P. 14(a).

[7] Contempt proceedings would have been an ill-suited method of determining whether TDC had any duty to accept felons pursuant to the Court's November 8, 1988 order. Moreover, the Court was concerned that contempt proceedings would have been premature because at that time there had not yet been a finding that the then existing conditions of confinement in the Harris County Jail facilities were unconstitutional. See, Benjamin v. Malcolm, 803 F.2d 46, n.6 (2d Cir. 1986), cert. denied sub. nom. Cuomo v. Koehler, 480 U.S. 910 (1987). (distinguishing Badgley v. Veralas, 729 F.2d 894 (2d Cir. 1984)).

County Defendants filed their third-party complaint against State Defendants on January 20, 1989. State Defendants responded with a series of motions to dismiss, to transfer venue, to join additional parties, to stay proceedings, and to abstain from exercising jurisdiction. On May 12, 1989, after receiving extensive briefs, the Court denied all of State Defendants' motions.

On June 9, 1989, the Court entered an order that recognized the unusual procedural posture of this case and sought to establish an expeditious, yet procedurally fair, manner of resolving the issues raised in County Defendants' third-party complaint. Because the facts relevant to a determination of the appropriate relief County Defendants were entitled to by their third-party complaint appeared to be fully developed by the Special Master's June 2, 1989 Final Findings, the Court sua sponte moved for summary judgment in favor of County Defendants.[8] The Court indicated that if either party filed timely sworn objections to any of the Special Master's findings, the Court would proceed by holding a plenary evidentiary trial to the bench on August 14, 1989. Because both parties subsequently filed objections to the Special Master's June 2, 1989 findings, the Court's sua sponte motion for summary judgment became moot.

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[8] State Defendants objected to the Court's sua sponte motion for summary judgment, claiming that it not only violated Fed. R. Civ. P. 56, but that it was "fundamentally unfair under traditional notions of due process." See State Defendant's cross motion for summary judgment and response to Court's order of June 9, 1989 (instrument number 992 in file) at 3, n. 2. However, both the United States Supreme Court and the Fifth Circuit Court of Appeals have recognized that a district court may sua sponte grant summary judgment when the parties have been given adequate time for discovery and adequate notice that they must come forward with all their evidence. See Celotex Corporation v. Catreett, 477 U.S. 317, 326 (1986); Page v. DeLaune, 837 F.2d 233, 238 (5th Cir. 1988). This case appeared to be well suited for disposition on summary judgment because the factual accuracy of the Special Master's findings could hardly be doubted. At the subsequent trial on County Defendants' third-party complaint, State Defendants offered no meaningful challenge to the accuracy of the Special Master's findings.

On May 30, 1989, Plaintiffs filed a motion asking the Court to transfer consideration of their requests for supplemental relief to the Honorable William Wayne Justice, the presiding judge in Ruiz v. Estelle, C.A. No. H-78-987 (S.D. Tex.). State Defendants responded to Plaintiffs' motion by urging a transfer of proceedings on County Defendants' third-party complaint; however, State Defendants objected to the transfer of Plaintiffs' pending motions. On June 29, 1989, State Defendants also filed a motion asking the Court to reconsider its May 12, 1989 Memorandum and Order denying their various motions to dismiss in light of the recent passage and acceptance of H.B. 2335.[9] By an order entered July 11, 1989, the Court denied Plaintiffs' motion to transfer proceedings and State Defendants' motion to reconsider.[10] Shortly thereafter, State Defendants filed an application for a writ of mandamus with the Fifth Circuit Court of Appeals asking the Court of Appeals to order this Court to transfer consideration of County Defendants' third-party complaint to the Ruiz court.

On August 11, 1989, the Friday preceding the trial scheduled for Monday, August 14, 1989, the Fifth Circuit Court of Appeals entered an order granting in part and denying in part State Defendants' petition for a writ of mandamus.[11] In essence the Court of Appeals allowed this Court to proceed with the August 14, 1989 trial to determine the merits of County Defendants' claims against State Defendants. However, in the event this Court found State Defendants liable to County Defendants, it was directed to transfer proceedings on the third-party complaint to Judge Justice for a determination of

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[9] Acts 1989, 71st Leg., Ch. 785.

[10] In response to Plaintiffs' request for clarification, the Court also gave notice to the parties in its July 11, 1989 order that it would permit Plaintiffs to present evidence relevant to their pending motions for relief against County Defendants at the August 14, 1989 trial. Allowing Plaintiffs to participate in the August 14, 1989 trial quickly created problems the Court did not anticipate in its July 11, 1989 order. Thus, 24 days later, on August 4, 1989, the Court informed the parties that it would not hear evidence on Plaintiffs' pending motions at the August 14, 1989 trial.

[11] In re: William P. Clements, et al., No. 89-2706 (5th Cir. 1989).

appropriate relief as to the State Defendants. Accordingly, the Court conducted the trial on County Defendants' third-party complaint in compliance with the Court of Appeals' directive. Thereafter, the Court concluded that it would be helpful to hear evidence on Plaintiffs' pending requests for relief. Thus, beginning September 12, 1989, the Court conducted a four-day hearing on Plaintiffs' pending motions. The Court allowed State Defendants to participate fully at the September 12 hearing and announced that it intended to consider all matters on a consolidated basis.

ALIGNMENT OF THE PARTIES

After taking County Defendants' third-party complaint under advisement, the Court became concerned that the original joinder of State Defendants may have been technically defective. as indicated above, the Court originally denied County Defendants' motion seeking to force Plaintiffs to join State Defendants pursuant to Fed. R. Civ. P. 19(a) and 21. Instead, Plaintiffs persuaded the Court that it would be more appropriate to join State Defendants as third-party defendants pursuant to Fed. R. Civ. P. 14(a). Moreover, under virtually identical circumstances, the Sixth and Second Circuit Courts of Appeals have held that joinder of State Defendants as third-party defendants is appropriate.[12] See Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), cert. denied sub. nom. Cuomo v. Koehler, 480 U.S. 910 (1987); Tate v. Frey, 735 F.2d 986 (6th Cir. 1984).

Nevertheless, County Defendants' joinder of State Defendants as third-party defendants pursuant to Rule

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[12] Tate v. Frey explicitly relied on Rule 14(a) as justifying the joinder of state officials by county officials. See Tate, 735 F.2d at 988-89. In Benjamin v. Malcolm, the Court of Appeals affirmed the district court's joinder of state officials as third-party defendants. However, the city defendants in Benjamin relied on Rules 19, 20 and 21 to justify joining state officials as third-party defendants. See Benjamin, 803 F.2d at 50; see also Benjamin v. Malcolm, 629 F.Supp. 713 (S.D. N.Y. 1986).

14(a) may have presented a serious jurisdictional problem under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). The Court expresses this concern at the hearing on Plaintiffs' requests for supplemental relief. In response to the Court's suggestion that an amended complaint would be appropriate, Plaintiffs filed a motion for leave to file a supplemental complaint naming various state officials as defendants pursuant to Fed. R. Civ. P. 15(d) and 19(a). The Court will grant Plaintiffs' motion for leave to file a supplemental complaint because the Court concludes that Plaintiffs' joinder of State Defendants pursuant to Rule 19(a) provides a more secure jurisdictional basis for relief than County Defendants' third-party complaint pursuant to Rule 14(a).

In its may 12, 1989 Memorandum and Order, the Court recognized that it had no jurisdiction to order State Defendants to obey state law.[13] However, the Court noted that this well recognized principle does not bar it from ordering State Defendants to conform their conduct to federal constitutional standards.[14] By way of explanation, the Court wrote:

> In the present case, [State Defendants] have two distinct duties: First, [State Defendants] have a state-imposed duty to "speedily" accept convicted felons into TDC. Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970). Second, [State Defendants] have a federal constitutional duty to not impose cruel and unusual punishment upon persons convicted of a felony in this state. If [State Defendants] have merely failed to "speedily" accept convicted felons into TDC as required by Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon 1970), this Court is powerless to compel compliance.

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[13] May 12, 1989 Memorandum and Order at 8.
[14] May 12, 1989 Memorandum and Order at 8.

> However, if [State Defendants] are directly responsible for the cruel and unusual punishment of convicted felons, this Court certainly has the authority to compel compliance with constitutional standards [footnotes and citations omitted].

May 12, 1989 Memorandum and Order at 8-9.

The Court believes that the passage quoted above accurately describes the "distinct duties" owned by State Defendants.[15] However, the cited passage failed to recognize explicitly that the "first distinct duty" owed by State Defendants is owed to County Defendants, whereas the "second distinct duty" owed by State Defendants is owed to the inmates at the Harris County Jail facilities, or the Plaintiff Class. The "second distinct duty," the duty to not impose cruel and unusual punishment, is the only federal duty this Court has the power to enforce.

The problem created by State Defendants' joinder as third-party defendants pursuant to Rule 14(a) becomes apparent once one recognizes that State Defendants' duty to not impose cruel and unusual punishment is owed to Plaintiffs, not to County Defendants. Rule 14(a) provides in relevant part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . . .

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[15] Of course, State Defendants' state-law duty to "speedily" accept inmates was modified by H.B. 2335. Nevertheless, State Defendants' duties toward the County Defendants appear to remain grounded in state law.

Prior to 1948, Rule 14(a) permitted a defending party to join as a third-party defendant any person not a party to the action "who is or may be liable to the third-party plaintiff or to the plaintiff." (Emphasis added). However, because the courts had held that a plaintiff could not be compelled to amend his complaint to state a claim against an additional party if he did not wish to do so, [16] the phrase "or to the plaintiff" was deleted from Rule 14(a) in 1948.[17] Thus, Rule 14(a), as amended, only allows a defendant to implead a third-party defendant if applicable law renders the third-party defendant liable to the defendant for some or all of the plaintiff's claims against the defendant. See Wright & Miller, Federal Practice and Procedure: Civil, Ë 1446 at 258 (West 1971). in this case, joinder of State Defendants pursuant to Rule 14(a) may have been improper because the only duties State Defendants owe County Defendants appear to be created by state law - duties this Court cannot enforce under Pennhurst. The federal duty State Defendants have breached is owed to Plaintiffs, not County Defendants.

In both Tate v. Frey and Benjamin v. Malcolm the state officials faced claims that they had a state-law duty to accept convicted felons from the local jails. In both cases, the Courts of Appeals rejected the state officials' contentions that Pennhurst barred relief against them because the courts noted that the district courts' orders were based upon findings that the state officials contributed to the violation of the inmates' federal constitutional rights. See Tate, 735 F.2d at 990; Benjamin, 803 F.2d at 52. Neither Court of Appeals appeared to be concerned, as this Court is, that local officials sought and were granted relief against state officials based on the state officials' violations of the inmates' rights, not the rights of the local officials.

The Benjamin Court cited the All Writs Act, 28 U.S.C. § 1651(a),[18] as providing federal jurisdiction over the

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[16] Of course, the rule that a plaintiff cannot be compelled to state a claim against an additional party if he does not wish to do so does not apply if the conditions of Fed. R. Civ. P. 19 are met.

[17] See, Advisory Committee's Note to the 1948 amendment to Rule 14 reprinted at 5 F.R.D. 446-48.

[18] 28 U.S.C. Ë 1651(a) provides:

city officials' claims against the state officials. Benjamin, 803 F.2d at 53. Relying on United States v. New York Telephone Co., 434 U.S. 159, 174 (1977), the Benjamin court noted that the Supreme Court had held that the All Writs Act authorizes a federal court in exceptional circumstances to issue orders to persons, "who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." Benjamin, 803 F.2d at 53 (citing New York Telephone, 434 U.S. at 174).

The Fifth Circuit Court of Appeals may ultimately follow Tate and Benjamin and conclude that federal jurisdiction exists over County Defendants' third-party complaint against State Defendants. For this reason, the Court will not disturb the present alignment between County and State Defendants. Nevertheless, the Court concludes that it would be remiss if it did not allow the filing of Plaintiffs' supplemental complaint as an alternative basis for jurisdiction.

The Court finds ample authorization in the Federal Rules of Civil Procedure and applicable case law that justifies such a post-trial amendment of pleadings. Fed. R. Civ. P. 21 provides, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Federal courts have always recognized their duty to look beyond the pleadings on file to arrange the parties according to their true interests. See City of Indianapolis v. Chase National Bank of City of New York, 314 U.S. 63 (1941). Although such vigilance is normally required to avoid circumvention of the "complete diversity" rule of Strawbridge v. Curtiss, 3 Cranch 267 (1806), realignment

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The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

may be necessary on other grounds as well.[19] In this case, Plaintiffs should be aligned as adversaries of State Defendants in order to avoid any questions of standing or jurisdiction.

State Defendants are clearly persons who should be joined if feasible under Rule 19(a)(1) because their joinder by Plaintiffs will not deprive the Court of jurisdiction and complete relief cannot be accorded among those already parties in their absence. The Fifth Circuit Court of Appeals has held that once a court has determined that a party should be joined under Rule 19(a), it should order the plaintiff to amend his complaint to add the party. English v. Seaboard Coast Line Railroad Co., 465 F.2d 43, 47 (5th Cir. 1972).

The United States Supreme Court has recognized that plaintiffs may have to resort to supplemental pleadings naming additional defendants where parties who were not originally joined as defendants have frustrated the Court's ability to vindicate plaintiffs' rights. See Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 226-27 (1964). The best practice would require parties to file supplemental pleadings raising all issues in advance of the trial. However, in this case the Court concludes that Rule 15(b) authorizes Plaintiffs' post-trial amendment so that the pleadings will conform to the evidence

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[19] For example, in Forsberg v. Pacific Northwest Bell Telephone Co., 622 F.Supp. 1147 (D.Or. 1985), aff'd 840 F.2d 1409 (9th Cir. 1988), the district court joined a union and union locals pursuant to Rule 19(a), then realigned the parties to ensure that any relief granted the plaintiff would be binding on the union and to protect the defendant employer from inconsistent liability. In Pennell v. Collector of Revenue, 703 F.Supp. 823 (W.D. Mo. 1989), the district court had to consider the proper alignment of the parties to determine whether all properly aligned defendants had joined in the removal petition as required. This Court itself recently had to consider the proper alignment of the parties in order to determine the necessity of a bond in a case where a preliminary injunction was entered and the United States was the nominal plaintiff. United States v. Taylor, et al., C.A. No. H-89-672. (S.D. Tex. March 21, 1989) (Memorandum and Order granting a preliminary injunction), aff'd, Nos. 89-2328, 89-2373 (5th Cir. August 28, 1989) (slip opinion).

presented at the August 14, 1989 trial and at the September 12, 1989 hearing.

The State Defendants previously joined as third-party defendants will not be prejudiced by Plaintiffs' post-trial supplemental complaint because the pretrial pleadings on County Defendants' third-party complaint, the Court's Orders entered May 12, 1989 and July 11, 1989, and the course of the August 14, 1989 trial and September 12, 1989 hearing gave State Defendants actual notice that a key issue was whether State Defendants' conduct resulted in the cruel and unusual punishment of the inmates in the Harris County Jail. Where the parties are actually aware of the issues to be tried, the court does not impinge on the defendant's right to due process by allowing a post-trial amendment. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 840-41 (D.C. Cir. 1950); Wright & Miller, Federal Practice and Procedure: Civil, Ë 1491 (West 1971).

However, the Court concludes that it would be improper to allow Plaintiff to join, post-trial, additional state officials who did not fully participate in the proceedings already conducted as third-party defendants. Thus, the Court will allow Plaintiffs to file their supplemental complaint, but it will deny Plaintiffs' request to join additional parties and strike any allegations in the supplemental complaint insofar as they apply to new parties.[20]

FINDINGS OF FACT

1. Plaintiffs' claims against County Defendants and State Defendants arose in this district. County Defendants' claims against State Defendants also arose in this district.

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[20] Plaintiffs' request to join the State of Texas would have been futile even if made prior to trial. This Court has no jurisdiction to entertain legal or equitable relief against the State of Texas as an entity. Cory v. White, 457 U.S. 85 (1982); Edelman v. Jordan, 415 U.S. 651 (1974).

2. The Harris County Jail facilities presently consist of the central jail, located at 1301 Franklin Street, and the detention center, located in Humble, Texas. County Defendants expect to complete renovation of the old "301 San Jacinto" jail by October of 1989 and to complete construction of a new "701 San Jacinto" jail by late 1991 or early 1992.

3. The design capacity according to the Texas Commission on Jail Standards for the 1301 Franklin central jail is 3,505 inmates. The design capacity of the Detention Center is 776 inmates. Thus, the total design capacity for the present Harris County Jail facilities is 4,281 inmates.

4. When completed, the design capacity of the old "301 San Jacinto" jail will be approximately 400, and the design capacity for the new "701 San Jacinto" jail will be approximately 4,000. Thus, by early 1992, the total design capacity of the Harris County Jail facilities will be approximately 8,681 inmates.

5. The actual inmate population at the downtown central jail on July 31, 1989 was 6,926, or 197.6% of its overall design capacity. The actual inmate population at the Detention Center on July 31, 1989 was 1,160, or 149.4% of its overall design capacity. Thus, the total inmate population for the Harris County facilities on July 31, 1989 was 8,086, or 188.8% of the facilities' overall design capacity. See County Defendants Exhibits No. 26 admitted at the August 14, 1989 trial.

6. By far the largest classes of inmates at the Harris County Jail facilities are convicted felons ready for transfer to TDC and felony pretrial detainees. On July 31, 1989 there were 3,420 convicted felons ready for transfer to TDC and 2,340 felony pretrial detainees. A complete breakdown of the population on July 13, 1989 follows:

Pretrial Detainees:

Felony Charges	2,340
Misdemeanor Charges	155
Both Misdemeanor & Felony Charges	291
Other Pretrial Detainees	228
	3,014
County Prisoners:	
Serving County Time	820
Serving County Fine	81
Serving County Time with Open Charges	3
Serving County Fine with Open Charges	0
	904
Class C Misdemeanors Only:	
Class C Serving Fine	34
Class C with Open Charges	68
	102
Felony Convictions:	
Awaiting Delivery Orders	29
Convictions with Additional Charges	243
Convictions Awaiting Delivery Order Dates	3,420
Convictions Awaiting Appeal	80
Convictions Serving County Time/Fine	17
	3,789
TDC Parole Violators	30
Bench Warrant Prisoners	61
Fugitives	56
Civil District Court Detainees	6
Federal Prisoners	124
Immigration Prisoners	0

	277
TOTAL:	8, 086

7. The overcrowding problem at the Harris County Jail facilities is much more severe than the overall inmate-capacity figure of 188.8% indicates. Because County Defendants have steadfastly attempted to maintain appropriate classification and segregation of inmates, the population is not evenly distributed throughout the jail facilities. Very few cellblocks house less than 100% of their design capacity; most cellblocks house far in excess of the overall population figure of 188.8% of design capacity. In fact, many cellblocks house between 300% to 500% of their capacity. See County Defendants' Exhibit Nos. 15 and 39 admitted at the August 14, 1989 trial. Extreme overcrowding is the primary cause of the conditions of confinement listed below that inmates must endure at the Harris County Jail facilities.

8. Approximately 2,800-2,900 inmates must sleep on mattresses on the floor each night. See Testimony of Captain Don McWilliams at the August 14, 1989 trial.

9. Deputies are unable to control which inmates are allowed to sleep on bunks and which are relegated to the floor. Stronger inmates are free to impose their will upon weaker inmates. See testimony of McWilliams, supra; see also testimony of Michael Keating at the August 14, 1989 trial.

10. In some cellblocks, inmates form a "human carpet" in their attempt to find space to sleep on the floor. Some inmates sleep on the floor under fixed bunks, without enough clearance to even turn over during the night. See testimony of Steve Martin at the September 12, 1989 hearing.

11. The physical design of the central jail's cellblocks prevents a deputy from observing all inmates within a

cell without entering the cell to make a visual inspection. See testimony of Keating, supra.

12. The number of deputies on the jail staff is insufficient to assure the safety of all inmates under the present extreme crowding situation. Deputies do not always enter every cell each hour for a visual inspection as required by this Court's Order entered December 18, 1984. See testimony of Keating, supra. See also testimony of Perry Johnson, Michael Reese, Don McWilliams at the September 12, 1989 hearing.

13. There has been a great increase in the number of reported disciplinary violations. Prior to the overcrowding crisis, there was an average of 250 to 350 disciplinary violations reported per month. Now there are over 600 disciplinary violations reported each month, and deputies no longer report minor violations. See testimony of McWilliams, supra.

14. Frequently, one half of the plumbing within a cellblock is not operable. On occasion, none of the faucets in an entire cellblock works. See testimony of McWilliams, supra.

15. Ventilation in the central jail is very poor. There is a 10 to 15 degree difference in temperature between the inner and outer ring of a floor. The fact that many inmates are heavy smokers exacerbates the ventilation problem. In some cell-blocks the stench caused by the overcrowding of inmates is overwhelming. The walls are often slimy with humidity because of constant showering. See testimony of Keating, Martin, and Johnson, supra.

16. Fire safety in the central jail is severely compromised by the extreme overcrowding of the facilities. Housing areas are not protected by a sprinkler system. Thus, in the event of a major fire the only solution would be complete evacuation of all inmates. It would be virtually impossible to

evacuate the nearly 7,000 inmates housed on the twelve floors of the central jail safely and quickly. There is no second means of egress at the Detention Center. See testimony of Johnson and Keating, supra.

17. The Sheriff is unable to continuously supply inmates with basic necessities such as clothing, soap, and feminine hygiene. Some inmates are left naked with only sheets or towels to cover themselves while their clothes are being washed. Many inmates must launder their own underwear in the cellblock sink. See testimony of Keating and McWilliams, supra.

18. . The Sheriff has insufficient staff and equipment to provide appropriate food service for the current population. There are not enough trays to serve all inmates at once; therefore, trays must be immediately washed and recycled during breakfast and dinner until everyone is fed. It takes approximately three hours to feed all of the inmates in the central jail. Breakfast usually begins at about 3:30 a.m. and dinner begins at about 4:00 p.m. There is no longer enough room in the "day rooms" to feed all the inmates; thus, many inmates must eat their meals in their cell while sitting on the floor, on the toilet, in a shower stall, or on a bunk. Eating in the cells has contributed to sanitation problems. See testimony of Keating and McWilliams, supra.

19. The medical staff at the Harris County Jail facilities is unable to provide adequate medical care for the current population. Inmate requests for medical attention frequently are not granted for a month or more. On one occasion, a jail physician delayed full treatment of an inmate's ulcer because the physician simply did not believe the inmate when the inmate reported that he had blood in his vomit. As a result, the inmate died of a bleeding ulcer. Other cases of indifference were documented. The medical care provided to the inmates at the Harris County Jail facilities constitutes conscious indifference towards the inmates' serious medical needs. See testimony of Dr. Armond Start and Dr. Michael Sargant at the

September 12, 1989 hearing; see also testimony of Keating, McWilliams, Reese, supra.

20. A recent outbreak of a pneumococcal infection at the Harris county Jail facilities is directly related to the overcrowded conditions. Two inmates died from this infection and approximately 30 other were hospitalized or treated at the jail clinic. See testimony of Dr. Daniel Musher at the September 12, 1989 hearing.

21. The Harris County Pretrial Services Agency (PTSA) interviews approximately 95% of all inmates entering the Harris County Jail facilities to determine which inmates may qualify for pretrial release on personal bonds without sureties. A PTSA employee interviews the inmate to determine elements of the inmate's background relevant to the inmate's likelihood of appearing in court if released on a personal bond. PTSA has developed an objective system of "scoring" each inmate. A perfect score is 7; inmates with a score of 5 or above are considered good candidates for release on a personal bond and their application is forwarded to the appropriate judge. See testimony of Charles Noble at the August 14, 1989 trial.

22. In an average month, PTSA will interview approximately 1,700 inmates arriving with felony charges. Of the 1,700 interviewed, PTSA will forward approximately 485 to 585 applications to the appropriate state district judge. All of the applications forwarded to the district judge reflect inmates who, on an objective scale, would be good candidates for pretrial release on a personal bond. During an average month only 150 to 160 applications for personal bonds are approved. See testimony of Noble, supra.

23. While district judges are considering the release of persons generally accused of far more serious crimes requiring greater concern for public safety, the county judges have obviously given greater weight to PTSA recommendations than have the district judges. One-half of the district judges

approve fewer than 100 personal bonds per year. The director of PTSA testified that many district judges do not consider the great majority of applications for personal bond that are forwarded to them. For example, on a given day, one judge reviewed only three of the 53 applications presented to him relating to inmates who would be good candidates for release on personal bond. Of the three applications the judge reviewed, only one was approved. See, State Defendants' exhibit numbers 70 and 72. See also testimony of Noble, supra.

24. In light of credible testimony that district judges refuse to consider personal bonds for inmates who by objective criteria would be good candidates for release, this Court concludes that the restriction of liberty of such pretrial detainees is arbitrary and purposeless.

25. Ultimately, counsel for State Defendants and counsel for County Defendants admitted in open court that the conditions of confinement in the Harris County Jail facilities are unconstitutional. After considering the totality of the conditions of confinement in the Harris County Jail facilities, the Court finds that those conditions are cruel and unusual in violation of the Eighth and Fourteenth Amendments.

26. State Defendants' refusal to accept convicted felons ready for transfer to TDC has caused those inmates to suffer cruel and unusual punishment in the Harris County Jail facilities.

27. County Defendants have failed to provide a safe and suitable jail as required by the consent decree and the Court's subsequent remedial orders. Even if all TDC-ready prisoners were removed from the jail, the population would still exceed design capacity by approximately 400 inmates.

28. Because of the poor physical design of the central jail and the lack of a second means of egress from the Detention Center, the Court finds that the maximum

constitutional capacity for the Harris County Jail is its overall design capacity, or a total of 4,281 inmates. This Court's previous staffing order entered December 18, 1984 assumed that a 9-9-7 staffing ratio could adequately safeguard no more than the number of inmates the facilities were designed to house.

29. State Defendants acted under color of state, not federal, law when the implemented the scheduled admissions policy that caused the overcrowding crisis in the Harris County Jail facilities. State Defendants could have complied with the requirements of the Ruiz decree without refusing to accept prisoners. Federal authority did not require them to refuse to accept inmates from county jails. The most obvious alternative would have been to timely build new prison facilities. The Court described other alternatives in its May 12, 1989 Memorandum and Order. State Defendants' actions are fairly attributable to the State for purposes of the Fourteenth Amendment.

30. An actual controversy exists between County Defendants and State Defendants. County Defendants' assertion of the right of Plaintiffs via County Defendants' third-party complaint has allowed the applicable constitutional issues to be presented vigorously and cogently.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over Plaintiffs' supplemental complaint against State Defendants pursuant to 28 U.S.C. § 1343 (a) (3).

2. The Court has jurisdiction over Plaintiffs' requests for supplemental relief pursuant to the consent judgment entered in this case on February 4, 1975 and 28 U.S.C. § 1343 (a) (3).

3. The Court has jurisdiction over County Defendants' third-party complaint pursuant to 28 U.S.C. §§

1331, 1343 (a) (3) and 1651 (a). Moreover, the Court has ancillary jurisdiction over County Defendants' third-party complaint. See Owen Equipment and Erection Company v. Kroger, 437 U.S. 365, 375 at n. 18 (1978); Rogers v. Aetna Casualty and Surety Company, 601 F.2d 840, 843 at n. 4 (5th Cir. 1979); Wright & Miller, Federal Practice and Procedure: Civil, Ë 1444, at 223 n. 68 (West 1971).

4. Venue for Plaintiffs' supplemental complaint against State Defendants lies in this district because Plaintiffs' claims against State Defendants arose in this district. (See finding of fact 1.) 28 U.S.C. § 1391 (b).

5. Venue for County Defendants' third-party complaint against State Defendants lies in this district because their claims against State Defendants arose in this district. (See finding of fact 1.) 28 U.S.C. § 1391 (b). Moreover, State Defendants, as third-party defendants pursuant to Rule 14, may not contest venue. F&D, Inc. v. O'Hara & Kendall Aviation, Inc., 547 F.Supp. 44, 45 (S.D. Tex. 1982). See also Lone Star Package Car Co. v. Baltimore & O.R. Co., 212 F.2d 147 (5th Cir. 1954); Wright & Miller, Federal Practice and Procedure: Civil, § 1445 at 240 n. 14 (West 1971).

6. Although the Eleventh Amendment bars this Court from ordering State Defendants to obey state law, Pennhurst School & Hospital v. Halderman, 465 U.S. 89 (1984), the Court has jurisdiction to assure that State Defendants conform their conduct to federal constitutional standards. Ex parte Young, 209 U.S. 123 (1908).

7. This Court's jurisdiction is limited to "actual cases or controversies." Art. III, Ë 2, U.S. Const.; Flast v. Cohen, 392 U.S. 83 (1968). A corollary of this rule requires a party to have "standing" to assert its claims. The United States Supreme Court has noted that the "gist" of standing requires a litigant to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which

sharpens the presentation of issues. . . ." Baker v. Carr, 369 U.S. 186, 204 (1962). In another context, the Supreme Court has held that a litigant must show some "injury to himself that is likely to be redressed by a favorable decision." Simon v. Eastern Kentuky Welfare Rights Organization, 426 U.S. 26, 38 (1976). Although litigants are not normally allowed to assert the rights of third parties, the Supreme Court has made it clear that this limitation is not constitutionally mandated. Craig v. Boren, 429 U.S. 190, 193 (1976). Instead, the limitation on a litigant's ability to assert the right of a third party is simply a "rule of self-restraint" based on "prudential objectives." Id. So long as a litigant asserts a sufficiently concrete interest in the outcome of its suit to meet the case or controversy requirement of Article III, a federal court may allow the litigant to assert the rights of a third party where the applicable constitutional questions have been and continue to be presented vigorously and `cogently'. . . ." Id at 194; see also Singleton v. Wulff, 428 U.S. 106, 112-16 (1976); Benjamin, 803 F.2d at 54.

8. In order to be entitled to relief under 42 U.S.C. § 1983, a party must prove: (1) that the defendant deprived him of a right secured by the Constitution or laws of the United States, and (2) that the defendant deprived him of that right under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978); Sims v. Jefferson Downs, Inc., 778 F.2d 1068, 1076 (5th Cir. 1985).

9. The Eighth Amendment, which prohibits cruel and unusual punishment, is applicable to the states through the Fourteenth Amendment. Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981); Robinson v. State of California, 370 U.S. 660, 666 (1962).

10. Normally, the involvement of a state official "plainly provides the state action essential to show a direct violation of [a plaintiff's] Fourteenth Amendment . . . rights, whether or not the actions . . . were official authorized or

lawful." Flagg Brothers, 436 U.S. at 157 n.5 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970)). In an action pursuant to 42 U.S.C. § 1983, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 929 (1982). However, state officials who act solely pursuant to federal authority, act under color of federal, not state, law and are not subject to liability under 42 U.S.C. § 1983. District of Columbia v. Carter, 409 U.S. 418, 424 (1973); Askew v. Bloemker, 548 F.2d 673, 676-77 (7th Cir. 1976). A party deprived of his federally-protected rights by an official acting under color of federal law must state a claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and its progeny. See, Carter, 409 U.S. at 610. (See Finding of Fact 29.)

11. There is no static test by which to determine whether conditions of confinement are cruel and unusual. Rhodes, 452 U.S. at 346. The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). This Court need not separately weigh each of the challenged constitutional practices and conditions; instead, it must look to "the totality of the conditions" existing in the Harris County Jail facilities. Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986) (citing Ruiz v. Estelle, 679 F.2d 1115, 1139 (5th Cir.), modified on other grounds, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). "The totality of conditions of confinement does not offend the Constitution unless prison conditions are cruel and unusual, not merely harsh and restrictive." Alberti, 790 F.2d at 1224 (quoting Ruiz, 679 F.2 at 1140).

12. In determining the constitutionality of the confinement of pretrial detainees, the Court must apply the Due Process Clause of the Fourteenth Amendment, not the Eighth

Amendment. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (citing Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977)). Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt. Bell, 441 U.S. at 535. However, not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense. Id. at 537. For example, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Id. at 539. Conversely, if a restriction or condition is not reasonably related to a legitimate goal - if it is arbitrary or purposeless - this Court may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees. Id. at 539.

13. In determining the amount of bail required to secure the release of an accused prior to trial, the Harris County Courts at law and District Courts are governed in the exercise of their discretion by the Constitution and by the following rules:

> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
>
> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
>
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.

5. The future safety of a victim of the alleged offense may be considered.

Tex. Code Crim. Proc. Ann. art. 17.15 (Vernon Supp. 1989).

The County Courts at law and District Courts also have the discretion to release a defendant on his personal bond without sureties or other security. Tex. Code Crim. Proc. Ann. art 17.03 (Vernon 1977). The primary purpose of an appearance bond is to secure the presence of a defendant in court at his trial. Ex parte Ivey, 594 S.W.2d 98 (Tex. Crim. App. 1980).

14. Pretrial detainees are entitled to reasonable medical care unless the failure to supply the care is reasonably related to a legitimate governmental objective. Cupit v. Jones, 835 F.2d 82 (5th Cir. 1987).

15. Convicted inmates are entitled to medical care that does not constitute deliberate indifference to their serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

16. Upon a finding that State Defendants and County Defendants are liable for the unconstitutional conditions of confinement presently existing in the Harris County jail facilities, the Court must fashion "the least intrusive remedy that will still be effective." Ruiz, 679 F.2d at 1145. This proposition does not mean that the Court must exhaust all conceivable avenues of relief against County Defendants before imposing relief against State Defendants. See, Benjamin, supra at 53. State Defendants and County Defendants deserve the same respect from the Court.

17. Under Texas law, the county sheriffs and commissioners courts are the keepers of the jails. Tex. Local Gov't Code Ann. §§ 351.001-.015 and §§ 351.041-.042 (Vernon 1988).

18. Under Texas law, TDC (now TDCJ, or the Texas Department of Criminal Justice) is responsible for the confinement of convicted felons. Tex. Penal Code Ann. §§ 12.32-.34 (Vernon 1974 and Cumm. Supp. 1989); Tex. § Crim. Proc. Ann. art. 42.09 (Vernon Supp. 1989).

19. Prior to September 1, 1989, the effective date of H.B. 2335, the transfer of convicted felons from the Harris County Jail to TDC was governed by the interplay between Tex. Code Crim. Proc. Ann. art 42.09 (West Supp. 1989) and Tex. Rev. Civ. Stat. Ann. art. 6166r (West 1970). Sections 2 and 3 of Article 42.09 of the Texas Code of Criminal Procedure explicitly provide that convicted felons shall be committed to TDC under certain circumstances pending, or at the conclusion of, an appeal. Sections 1 and 4 of Article 42.09, however, appear to envision at least a temporary stay at the jail when a felon does not appeal his conviction or when a felon appeals his conviction but his sentence is for a term of ten years or less. In the past, a convicted felon's temporary confinement in the Harris County Jail created no serious problems because Article 6166r required TDC to make suitable provisions for the "safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary. . . ."

20. H. B. 2335 made two important changes with respect to the transfer of convicted felons from the county jails to TDC. First, section 3.04 of H.B. 2335 deleted the requirement that TDC's acceptance of convicted felons be "speedy." Second, section 3.06 of H.B. 2335 requires the Texas Board of Criminal Justice to adopt and enforce an allocation formula that limits the number of convicted felons the institutional division will accept from the counties until sufficient capacity is available in the institutional division. H. B. 2335 did <u>not</u>, however, relieve State Defendants of their responsibility for the confinement of convicted felons. The State of Texas is free to allocate the admissions of felons into the penitentiary in virtually any manner it chooses so long as the allocation does not result in the cruel and unusual punishment of inmates. However,

when it becomes clear that convicted felons are being confined in conditions that violate the Eighth Amendment, the relevant inquiry becomes who is responsible for the confinement of these inmates. Fortunately, H.B. 2335 provides a clear answer to this inquiry. Section 1.02 (a) (1) provides, "The department [TDCJ, formerly TDC] is the state agency with primary responsibility for . . . the confinement, supervision, and rehabilitation of felons. . . ." Thus, the fact that the State of Texas has "virtually complete freedom to decide who will be responsible" for the confinement of felons provides no shield from liability for State Defendants in this case because state law clearly places the primary responsibility for the confinement of felons upon them. See Bush v. Viterna, 795 F.2d 1203, 1209 (5th Cir. 1986).

21. In essentially the same circumstances, the Fifth Circuit Court of Appeals has held that state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners committed to their custody on the ground that they have no control over the operation of local jails. Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982). Subsequently, the Second Circuit came to the same conclusion. See Benjamin, 803 F.2d at 51. Bush v. Viterna supra did not purport to overrule Stewart v. Winter. In fact, the Bush panel could not have overruled Stewart because the Fifth Circuit Court of Appeals adheres to the rule that only intervening Supreme Court authority or the Court sitting en banc can overrule a previous panel decision. Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976), majority opinion adopted by en banc court, 550 F.2d 342 (5th Cir. 1977). The Court is not aware of any intervening en banc or Supreme Court authority purporting to overrule Stewart. Thus, to the extent that H.B. 2335 attempts to exculpate State Defendants from liability for the cruel and unusual punishment of convicted felons incarcerated at county jails, it is ineffective.

22. A convicted felon ready for transfer to TDC is defined as:

(a) An individual who is being confined pursuant to a judgment of conviction and sentence imposed in a felony case pursuant to a plea of guilty or nolo contendere (such individual being deemed "ready for transfer" on the date of sentencing); or

(b) An individual who is being confined pursuant to a judgment of conviction and sentence imposed in a felony case pursuant to the verdict or a jury or judge after a plea of not guilty by the defendant (such individual being deemed "ready for transfer" on (1) the date the defendant is taken into custody after affirmance of his or her conviction, if the defendant appeals the conviction and is released on bail pending disposition of the appeal, pursuant to Tex. Crim. Proc. Code Ann. § 42.09(2) (Vernon Supp. 1989); or on (2) the date the defendant requests transfer to the TDC, if the defendant is convicted of a felony and his sentence is a term of ten (10) years or less and he gives notice of appeal, pursuant to Tex. Crim. Proc. Code Ann. § 42.09(4) (Vernon Supp. 1989); or (3) the date notice of appeal is filed or the time for filing notice of appeal passes, whichever date first occurs, if a defendant is convicted of a felony and sentence to death, life or a term of more than ten (10) years in the TDC pursuant to Tex. crim.

Proc. Code Ann. § 42.09(3) (Vernon Supp. 1989)); and

(c) the individual has no other criminal detainers or criminal cases pending in county, state or federal trial courts; and

(d) all paperwork customarily required to transfer the individual to TDC has been satisfactorily completed pursuant to Tex. Crim. Proc. Code Ann. §§ 42.03(3), (4) (Vernon 1979) and 42.09(8) (Vernon Supp. 1989).

CONCLUSION

As indicated by the findings and conclusions above, the Court has determined that State Defendants and County Defendants are liable for the unconstitutional conditions of confinement in the Harris County Jail facilities.

The Fifth Circuit Court of Appeals has correctly bifurcated this case so that authority to decide any relief against State Defendants that affects the management or operations of the Department of Corrections rests with Judge Justice, the presiding judge in the Ruiz prison case. Despite the urgency for immediate remedy amply demonstrated by this record, the Court concludes that it should delay the imposition of relief against County Defendants so that the relief formulated by Judge Justice against State Defendants may be coordinated and interwoven with the remedial action required of the County. This appears to be the most logical approach the Court can take to determine "the least intrusive remedy that will still be effective." The Court envisions the issuance of a joint order or simultaneous orders of the judges.

But the solution to unconstitutional conditions in state penitentiaries and local jails requires more than the joint effort of two federal judges. Just decisions should be made by those who have the primary responsibility to make them -- the appropriate state and county officials. The Governor and the County Judge of Harris County have shown a willingness to find solutions fair to the citizenry of Harris County and the State and true to the constitution. Prior to the recent evidentiary hearings, Governor Clements and County Judge Lindsey, their staffs and attorneys, together with the court appointed monitors and counsel for the inmates, met in a marathon session to resolve differences and to find solutions to the growing national problem of prison overcrowding, which is particularly acute here.

The evidentiary hearings themselves were conducted in a dispassionate, orderly and thorough fashion. Early rancor and emotionalism dissipated in the face of an evidentiary record in which much was undisputed. In light of these factors, meaningful dialogue among the parties should continue.

Time will be required for Judge Justice to review proceedings here. This interval can be used by the parties to make every attempt to resolve issues without unnecessary judicial intervention.

The overcrowding in the Harris County facilities is extreme. Large and immediate reductions in inmate population are in order. The Court suggests that the parties look to the large groups of transfer-ready felony inmates, pretrial felony detainees and parole-eligible prisoners for such reductions. The state judiciary might be consulted so that recognition be given to the realistic policy of personal recognizance release of pretrial detainees as a more palpable alternative to the early release on parole of a like number of convicted felons by the use of the Texas Prison Management Act. Obviously all other means and options must be carefully scrutinized in the process. Accordingly, it is hereby

ORDERED that Plaintiffs' motion for leave to file a supplemental complaint is GRANTED but Plaintiffs' request to join additional parties is DENIED. Allegations in the supplemental complaint are STRICKEN insofar as they apply to new parties. It is further

ORDERED that State Defendants are liable to County Defendants on County Defendants' third-party complaint. It is further

ORDERED that State Defendants are liable to Plaintiffs on Plaintiffs' supplemental complaint. It is further

ORDERED that County Defendants' third-party complaint and Plaintiffs' supplemental complaint are TRANSFERRED to the Honorable William Wayne Justice for proceedings in accordance with the mandamus opinion of the Fifth Circuit Court of Appeals entered in this case. It is further

ORDERED that the Special Master arrange a meeting of all the principals and parties involved in this case in order to facilitate a settlement regarding the appropriate relief to be imposed.

SIGNED in Houston, Texas, this 25th day of September, 1989.

/s/
JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Z

Tex Gov't Code § 499.071. Allocation formula (Formerly Art. 6166a-4 (a) - (b).)

(a) The Texas Board of Criminal Justice shall develop, adopt, and enforce an allocation formula that fairly and equitably allocates to each county or group of counties served by a community corrections and supervision department the number of institutional division admissions allocated to the county or counties until sufficient capacity is available in the institutional division. In devising the formula, the board shall consider relevant factors for each county or group of counties served by a department and shall assign weights to those factors as determined appropriate by the board. The factors shall include but are not limited to:

(1) the percentage of prison admissions for the entire state that were used by the county or counties in the preceding 12 months;

(2) the percentage of the state's violent index crime that occurred in the county or counties in the preceding 12 months;

(3) the percentage of the state's total index crime that occurred in the county or counties in the preceding 12 months;

(4) the percentage of the state's total arrests under the Texas Controlled Substances Act (Article 4476-15, Vernon's Texas Civil Statutes) that occurred in the county or counties in the preceding 12 months;

(5) the percentage of the state's population residing in the county or counties; and

(6) the percentage of the state's total unemployment in the county or counties.

(7) the percentage of all defendants serving sentences for felonies who are paroled from the institutional division, a jail in this state, a federal correctional institution, or a jail or correctional institution in another state in the preceding 12

months and who were released to reside in the county or counties.

(b) If the board is unable to obtain for a factor listed in Subsection (a) information for the preceding 12-month period, the board shall consider the most recent information available for that factor.

(c) The board shall revise the formula annually.

APPENDIX AA

PERTINENT STATUTORY CHANGES ENACTED BY H.B. 93

TEXAS GOVERNMENT CODE CHAPTER 499

SUBCHAPTER F. PROCEDURES FOR REDUCING COUNTY JAIL BACKLOG[1]

§ 499.121. Legislative Declaration; Mandamus

(a) The legislature declares that until September 1, 1995, the institutional division shall continue to perform its duty to accept inmates only as provided by the allocation formula established under Section 499.071.[2]

(b) The legislature declares that until September 1, 1995, a county shall continue to perform its duty to confine and maintain under suitable conditions and at the county's own expense each inmate eligible for transfer from the county to the institutional division, until the date the inmate is actually accepted into custody by the institutional division. This subsection does not take effect if the County of Nueces et al. v. Texas Board of Corrections, et al., in the 250th Judicial District Court of Travis County, Texas, Cause No. 452,071 and Harris County, Texas v. the State of Texas, et al., in the 126th District Court of Travis County, Texas, Cause No. 475,468 are settled by written agreement on or before the 31st day after the effective date of this article.

(c) The legislature declares that on and after September 1, 1995, the institutional division has a duty to accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a

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[1] All the provisions set forth below were newly enacted by H.B. 93.

[2] This refers to Section 499.071 of the Texas Government Code, which is set forth in App. Z to the Petition.

county jail while under an order of commitment to the institutional division.

(d) The duties provided by this subchapter may be enforced by an action in mandamus.

§ 499.122. Inmate Count

The Commission on Jail Standards shall analyze monthly the population of each jail in this state that is the jail for a qualifying county and determine the number of inmates confined in the jail who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom all paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed. The commission may not consider in determining the population of the jail under this section any inmate who is in the jail after having been transferred from another jail and for whom the commission has made payment under this subchapter.

§ 499.123. Payment

(a) Not later than the 32nd day after the effective date of this subchapter, the Commission on Jail Standards shall determine for each jail in this state that is the jail for a qualifying county the number of inmates confined in the jail on April 1, 1991, who were awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer had been completed on that date.

(b) A qualifying county is entitled to payment from the Commission on Jail Standards as compensation to the county for confining the number of inmates determined as ready for transfer under Subsection (a) at an amount per inmate to be determined

by dividing into $11.5 million the total number of inmates in jails that are the jails for qualifying counties under Subsection (a) confined by qualifying counties. The commission shall make the payment under this subsection on or before January 15, 1992.

(c) Not later than September 10, 1993, the Commission on Jail Standards shall determine for each jail in this state that is the jail for a qualifying county the number of inmates confined in the jail on September 1, 1993, who were awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer had been completed, as determined under Section 499.122, on that date.

(d) A qualifying county is entitled to payment from the Commission on Jail Standards as compensation to the county for confining the number of inmates determined as ready for transfer under Subsection (c) at an amount per inmate to be determined by dividing the total number of inmates, in county jails that are the jails for qualifying counties under Subsection (c) confined by qualifying counties into $11.5 million. The commission shall make the payment under this subsection on or before January 15, 1994.

§ 499.124. Emergency Overcrowding Relief.

(a) From the effective date of this subchapter until August 31, 1993, for each month in which the number of inmates confined in a jail that is the jail for a qualifying county who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed, as determined under Section 499.122, is greater than 50 percent of the number of such inmates confined in the jail on April 1, 1991,

as determined under Section 499.123, the Commission on Jail Standards shall pay to a qualifying county for each inmate in excess of 50 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number for each day of confinement the sum of $30.

(b) From September 1, 1993, until September 1, 1995, for each month in which the number of inmates confined in the jail that is the jail for a qualifying county who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision and for whom paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer have been completed, as determined under Section 499.122, is greater than 25 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123, the Commission on Jail Standards shall pay to a qualifying county for each inmate in excess of 25 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number for each day of confinement $30.

§ 499.125. Transfer of Felony Backlog

(a) If a state or federal court determines that conditions in a county jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the institutional division is 20 percent or more of the total number of inmates in the jail, the commission shall transfer inmates from the jail to an appropriate jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring the county into compliance with court orders or to reduce the percentage of inmates in the jail awaiting transfer to the institutional division to less than 20 percent of the total number of inmates in the jail.

(b) The Commission on Jail Standards is liable to counties for payment of the costs of transportation for and maintenance of transferred inmates. Costs paid to a county shall be paid into the treasury of the county operating the facility receiving the inmates. The costs for maintenance of an inmate for which the commission is liable under this section are:

> (1) the actual costs, as determined by the agreement between the board and the officer or governing body authorized by law to enter into contracts but only if Harris County, Texas v. the State of Texas, et al., in the 126th District Court of Travis County, Texas, Cause No. 475,468 is settled by written agreement on or before the 31st day after the effective date of this subchapter; or
>
> (2) if the suit described by Subdivision (1) of this subsection is not settled within the period specified by the subdivision, for each inmate for each day the first $20 of actual costs and one-half of costs that are in excess of $20, with the transferring county liable to the operators of the receiving facility for all costs are [sic] not paid by the state.

(c) If the board determines that a county is not reasonably utilizing its available certified jail beds, the payments authorized by this section shall be withheld to the extent necessary to equal the cost of the unutilized beds.

§ 499.126. Definition

(a) In this subchapter, "qualifying county" means a county that:

(1) on or after the effective date of this subchapter does not initiate or become a party to a suit against the state or a state agency or state official, the subject of which is the reimbursement of the county for confinement of inmates in

the county jail who are awaiting transfer to the institutional division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision; and

(2) if, before the effective date of this subchapter, it was a party to a suit in state court described by Subdivision (1), has before the 31st day after the effective date of this subchapter:

(A) had the county's suit vacated and dismissed by the court:

(B) had the county's suit abated by the court, by entry of an abatement order that specifically provides that:

(i) the suit may not be reactivated except before September 1, 1997, and except on a finding by the court that the state has substantially failed to perform a duty imposed under this subchapter;

(ii) the county is barred from any claim for reimbursement for the cost of confining inmates on and after the effective date of this subchapter and until September 1, 1995, other than reimbursement specified in this subchapter; and

(iii) if the suit is not reactivated before September 1, 1997, the court shall vacate and dismiss the suit on that date; or

(C) had the county's suit settled by written agreement.

(b) For the purposes of this section, a court retains jurisdiction over a case in which the court has entered an abatement order during the period in which the case is abated.

APPENDIX BB

THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

July 9, 1987

Honorable Gary Garrison
Ector County Attorney
Courthouse, Room 218
Odessa, Texas 79761

Opinion No. JM-743

Re: Liability for medical costs of an individual in a county jail awaiting a hearing for violation of parole conditions

Dear Mr. Garrison:

You ask whether the Texas Department of Corrections or the county of incarceration is responsible for the payment of medical care for a parole violator held in county jail pending a parole violation hearing.

The Adult Parole and Mandatory Supervision Law defines parole and mandatory supervision as the release of a prisoner from imprisonment but not from the legal authority of the state. Code Crim. Proc. art. 42.18, §2. Every prisoner on parole or mandatory supervision remains in the legal custody of the institution from which he was released but is subject to the orders of the Board ofPardons and Paroles. Code Crim. Proc. art. 42.12, §15(f)(3). If there is reason to believe that a parolee

has violated a condititon of his parole, the Board of Pardons and Paroles may issue a warrant authorizing the officers named in the warrant to take the parolee into "actual custody." Code Crim. Proc. art. 42.12, §21(a). The due process requirements of Morrissey v. Brewer, 408 U.S. 471 (1972), require that the parolee be given a revocation hearing at or near the location of the alleged violation. Pending the hearing on a charge of parole violation or violation of conditions of mandatory supervision, "a prisoner returned to custody shall remain incarcerated." Code Crim. Proc. art. 42.12, §21(a); art. 42.18, §14(a); 37 Texas Administrative Code §145.45(g). The Board of Pardons and Paroles may required a county sheriff to accept a prisoner of the board pending a parole revocation hearing. Representatives of a county where a parolee is detained on the basis of a prerevocation warrant issued by the Board of Pardons and Paroles may not transfer the parolee to the Texas Department of Corrections before completion of waiver of the required hearing. Attorney General Opinion JM-615 (1987).

Counties are liable for medical expenses of prisoners "confined in or kept under guard in the county jail." Code Crim. Proc. art. 104.002. Although there is an exception in article 104.002 for prisoners transferred from another county "on a change of venue, for safekeeping, or for a habeas corpus hearing," there is not exception for prisoners awaiting hearings on parol revocation. The Texas Department of Corrections is responsible for the medical care of prisoners "confined therein." V.T.C.S. art. 6166g. See generally Attorney General Opinion JM-730. You suggest that because a parolee is in the legal custody of the Department of Corrections, he should be considered to be "confined" in the Department of Corrections rather than county jail for purposes of determining liablity for medical care.

Article 6166g makes the Texas Department of Corrections responsible for the medical care "of prisoners confined therein." Cf. Attorney General Opinion JM-580 (1986) (authority of TDC to asume medical cost of hospitalization of infant born to an inmate). Even though a prisoner incarcerated in a county jail pending a parole violation hearing is in the legal custody of the Department of Corrections he is in the actual custody of the county jail. We find no basis for construing the term "confined therein" in article 6166g to be synonymous with legal custody. Absent any indication of contrary legislative intent, we must read "confined therein" in its ordinary meaning. Gov't. Code §311.011(a) (words shall be construed according to common usage). The ordinary meaning of "confine" is "to restrain within limits." Webster's New International Dictionary (2d ed.). See Attorney General Opinion JM-730. A prisoner incarcerated in a county jail is not confined in the department of corrections. We conclude, therefore, that a county is responsible for medical care for a parole violator incarcerated in a county jail pending a parole revocation hearing pursuant to article 104.002.

SUMMARY

Medical care for a parole violator incarcerated in a county jail pending a parole revocation hearing is the responsibility of the county under the provisions of article 104.002 of the Code of Criminal Procedure.

Very truly yours,

/s/ JIM MATTOX
Attorney General of Texas

MARY KELLER
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special ASsistant Attorney General

RICK GILPIN
Chariman, Opinion Committee

Prepared by Nancy Sutton and
Sarah Woelk
Assistant Attorney General

APPENDIX CC

THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

July 9, 1987

Honorable Russell P. Brooks
Hunt County Attorney
P.O. Box 1097
Greenville, Texas 75401

Opinion No. JM-730

Re: Responsibility for medical expenses incurred on behalf of an indigent prisoner transferred from a county jail to the Texas Department of Corrections on a bench warrant

Dear Mr. Brooks:

You ask about payment of medical expenses for an indigent prisoner incarcerated in a county jail. Specifically, you ask about a prisoner who was serving a sentence in the Texas Department of Corrections (TDC) and was transferred from TDC to a county jail, pursuant to a bench warrant, in order to stand trial on a felony charge. While he was in the county jail, his jaw was broken and he underwent surgery at a local hospital. You ask whether TDC or the county jail is liable for his medical expenses.

Article 6166g, V.T.C.S., provides:

> The Texas [Board of Corrections], together with the [director] hereinafter provided for, shall be vested with the exclusive management and control of the [Department of Corrections], and all properties belonging thereto, subject only to the limitations of this Act, and shall be responsible for the management of the affairs of the [Department of Corrections] and for the proper care, treatment, feeding, clothing and management of the prisoners confined therein.

The statute requires TDC to provide medical care for "prisoners confined therein." See generally Attorney General Opinion JM-580 (1986).

Article 104.002(a) of the Code of Criminal Procedure governs liability for expenses for the care of persons incarcerated in county jails:

> Except as otherwise provided by this article, a county is liable for all expenses incurred in the safekeeping of prisoners confined in the county jail or kept under guard by the county. If a prisoner is transferred to a county from another county on a change of venue, for safekeeping, or for a habeas corpus hearing, the county transferring the prisoner is liable for the expenses described by this article. (Emphasis added).

Article 104.002(a) makes counties liable for medical care provided to indigent prisoners confined in county jail. Attorney

General Opinion Nos. JM-643 (1987); JM-487 (1986); H-703 (1975); M-870 (1971).

The prisoner in question was transferred from TDC to the county jail pursuant to a bench warrant. A bench warrant is the common law writ used to bring a convict confined in the penitentiary to trial in another case. Ex part Lowe, 251 S.W. 506, 507 (Tex. Crim. App. 1923); Gaines v. State, 53 S.W. 623, 624 (Tex. Crim. App. 1899). Both article 6166g, V.T.C.S., and article 104.002 of the Code of Criminal Procedure discuss liability for prisoners "confined in" prisons and jails, respectively. The ordinary meaning of "to confine" is "to restrain within limits." Webster's New International Dictionary (2d ed.). Words in statutes should be given their ordinary meanings. Gov't. Code art.10(i), §311.011(a). Therefore, we construe "confined" in article 6166g and article 104.002 to refer to a prisoners' physical presence in a prison or jail. Thus, the prisoner in question was no longer "confined in" TDC while he was in the county jail. Cf. Ex. parte Hudson, 655 S.W.2d 206, 208 (Tex. Crim. App. 1983) (prisoner may receive credit toward TDC sentence for time spent in county jail if TDC places a "hold" on prisoner); Ex parte Alvarez, 519 S.W.2d 440, 443 (Tex. Crim. App. 1975). Rather, he was "confined in" the county jail. See also Code Crim. Proc. art. 104.002 (specifically excepting prisoners brought from another county on a change of venue, for safekeeping, or for a habeas corpus hearing). Therefore, article 104.002 of the Code of Criminal Procedure rather than article 6166g, V.T.C.S., governs liability for medical expenses of the indigent prisoner you describe.

You also ask whether the enactment in 1985 of the Indigent Health Care and Treatment Act, article 4438f, V.T.C.S., affects our answer to your question. Both article 104.002 of the Code of Criminal Procedure and article 6166g are specific statutes governing indigent health care in specific

situations. The Indigent Health Care Act governs indigent health care generally. We concluded in Attorney General Opinion JM-643 (1987) that the Indigent Health Care Act does not affect the application of article 104.002 of the Code of Criminal Procedure. Similarly, we conclude that the Indigent Health Care Act does not affect application of article 6166g, V.T.C.S. See American Canal Co. of Texas v. Dow Chemical Co., 380 S.W.2d 662, 666 (Tex. Civ. App. - Houston 1964, writ dism'd).

SUMMARY

A county is liable for the medical expenses of a prisoner confined in county jail who was transferred from the Texas Department of Corrections to the county jail pursuant to a bench warrant.

Very truly yours,

/s/ JIM MATTOX
Attorney General of Texas

MARY KELLER
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chariman, Opinion Committee

Prepared by Sarah Woelk
Assistant Attorney General

APPENDIX DD

37 TAC Ch. 152 (in pertinent part):

§ 152.1. Purpose. Texas Civil Statutes, Article 6166a-4, requires the board to adopt and enforce an allocation formula to fairly and equitably allocate to each county the Available Institutional Division admissions until sufficient capacity is available in the Institutional Division to accept all prisoners eligible for transfer to the Institutional Division. An annual determination by the board that there is insufficient capacity in the Institutional Division to accept all prisoners from Texas county jails who are eligible for transfer into the Institutional Division as soon as they become eligible, shall make it necessary to adopt and enforce such a formula.

§ 152.2. Definitions and Exceptions.

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Available institutional division admissions - The total number of beds available within the Institutional Division for intake of prisoners is based upon the estimated rate of release of prisoners from the Institutional Division, minus .03333 of those beds which is adequate to allow the Institutional Division to expeditiously receive from the

counties any new prisoners who are sentenced to death, or who are recaptured escapees, pre-parole violators, Institutional Division prisoners returning from federal bench warrants, interstate corrections compact transfers, and out-of-state parole violators. Therefore, the number of admissions available is based upon an estimated rate of prisoner flow through the Institutional Division to maintain the Institutional Division capacity.

(2) Institutional division capacity - The total number of beds available for use within the Institutional Division in accordance with the limitations on capacity and its use imposed by federal court orders in *Ruiz v. Lynaugh*, Number H-78-987 (Southern District Texas, Houston Division.) Available institutional capacity at the time of the adoption of this section will be no more than 43,951. When the Lewis unit is populated and in operation, available Institutional Division capacity will be no more than 49,681.

(b) The Institutional Division may suspend or cancel admissions when the acceptance or transport of prisoners would be unsafe, such as in cases of extremely severe weather or civil disturbance, or would cause non-compliance with federal court orders. The Institutional Division is not required to make up for admissions so suspended or canceled. On days that the Institutional Division is closed due to holidays, the

number of admissions is decreased by the number of days of closure multiplied by the current number of daily admissions. The balance of admissions for the weeks is prorated out to the counties based upon their allocated percentage of intake.

APPENDIX EE

NO. 475,468

HARRIS COUNTY, TEXAS	§	IN THE DISTRICT
	§	COURT
Plaintiff and Relator,	§	
	§	
V.	§	
THE STATE OF TEXAS; ANN	§	
RICHARDS, GOVERNOR OF THE	§	
STATE OF TEXAS; TEXAS	§	
DEPARTMENT OF CRIMINAL	§	
JUSTICE; JAMES LYNAUGH,	§	
DIRECTOR; TEXAS BOARD	§	
OF CRIMINAL JUSTICE;	§	
CHARLES T. TERRELL; JERRY	§	TRAVIS COUNTY,
H. HODGE; F. L. STEPHENS;	§	TEXAS
BEN GALLANT, JR.; JAMES	§	
ELLER; MAMIE MOORE	§	
PROCTOR; ROBERT MANN;	§	
AND ALLAN B. POLUNSKY;	§	
AS MEMBERS OF THE TEXAS	§	
BOARD OF CRIMINAL	§	
JUSTICE,	§	126TH JUDICIAL
	§	DISTRICT
Defendants and Respondents	§	

AGREED ORDER VACATING JUDGMENT

On the date indicated below came on to be heard the joint motion of the Plaintiff/Realtor, the Harris County, Texas, and the Intervenor, Montgomery County, Texas; together with the Defendants/Respondents, the State of Texas; Ann Richards, Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F.L. Stephens; Ben

Gallant Jr.; James Eller; Maime Moore Proctor: Robert Mann; and Allen B. Polunsky; as members of the Texas Board of Criminal Justice for vacation of the judgment entered by this Court on August 2, 1991. The Court, having considered the said motion, finds that the parties have satisfactorily compromised and settled all matters in dispute in this cause. The Court further finds that the vacation of the judgment is conditional on the Defendants/Respondents' performance of the requirements of the Agreement, attached to the motion as Attachment A, and on the Plaintiff/Realtor and Intervenor being able to file a motion with this Court to reinstate the judgment, attached to the motion as Exhibit C to Attachment A, if Defendants/Respondents fail to perform under the terms of the Agreement. The Court further finds that the vacation of judgment is conditional on the agreement of the parties that if the Court determines that the Defendants/Respondents have violated the terms of the Agreement, then the Court shall reinstate and enter the original judgment, attached to the motion as Exhibit C to Attachment A. Further, the vacation of the judgment is, and shall be, conditional on the agreement of the parties that if the Court determines that the Defendants/Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment as provided, the Court shall enter the judgment attached to the motion as Exhibit C to Attachment A. The Court further finds that the Defendants/Respondents reserve their right to appeal if the judgment is reinstated or the new judgment is entered. The Court further finds that the motion should be granted.

It is therefore, ORDERED, ADJUDGED, and DECREED that the judgment entered by this Court on August 2, 1991, in the above-styled and numbered cause be, and the same hereby is, vacated subject to being reinstated if the Defendants/Respondents fail to perform the requirements of the Agreement attached to the motion as Attachment A, or, in the alternative, if the Court determines that the Defendants/Respondents have violated the terms of the

Agreement, and determines that it is unable to reinstate the judgment, the entry of the new judgment attached to the motion as Exhibit C to Attachment A.

SIGNED and ENTERED this 25th day of October 1991.

/s/
JUDGE JOSEPH HART
126th Judicial District

APPROVED AS TO FORM AND SUBSTANCE:

MIKE DRISCOLL
HARRIS COUNTY ATTORNEY
1001 Preston, Suite 634
Houston, Texas 77002-1891
(713) 755-7961

By: /s/
FRANK SANDERS
State Bar No. 17588500
Assistant County Attorney

ATTORNEYS FOR HARRIS COUNTY, TEXAS

D.C. JIM DOZIER
MONTGOMERY COUNTY ATTORNEY
301 North Main Street, Suite 300
Conroe, Texas 77301
(409) 539-7828

By: /s/
STEVE MCKEITHEN
State Bar No. 13700550
Assistant County Attorney

ATTORNEYS FOR INTERVENOR
MONTGOMERY COUNTY, TEXAS

DAN MORALES
ATTORNEY GENERAL OF TEXAS

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2080

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Executive Assistant Attorney General

By: /s/
DAN MORALES
State Bar No. 14417450

ATTORNEYS FOR RESPONDENTS

APPENDIX FF

NO. 452,071

THE COUNTY OF NUECES TEXAS, ET AL. Relator	§	IN THE DISTRICT COURT
V.	§	
TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; DERALYN R. DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH	§	TRAVIS COUNTY, TEXAS
Respondents	§	250TH JUDICIAL DISTRICT

AGREED ORDER VACATING JUDGMENT

On the date indicated below came on to be heard the joint motion of the Realtor, the County of Nueces, Texas; and the Intervenors, The County of Travis, Texas, the County of Tarrant, Texas, The County of Dallas, Texas, The County of Victoria, Texas, The County of Collin, Texas, The County of Hunt, Texas, The County of Bexar, Texas, The County of El Paso, Texas, The County of Lubbock, Texas, The County of Galveston, Texas, and The County of Hidalgo, Texas; together with the Respondents, Texas Board of Corrections, Charles T. Terrell, Jerry H. Hodge, F.L. Stephens, Deralyn Davis, James Eller, Dennis R. Hendrix, Joe V. LaMantia, Jr., Robert Mann, Allan B. Polunsky, and James A. Lynaugh for vacation of the judgment entered by this Court on August 22, 1990. The Court,

having considered said motion, finds that the parties have satisfactorily compromised and settled all matters in dispute in this cause. The Court further finds that the vacation of the judgment is conditional of the Respondents' performance of the requirements of the Agreement, attached to the motion as Attachment A, and on the Relator or, any or all of, the Intervenors being able to file a motion with this Court to reinstate the judgment, attached to the motion as Exhibit D to Attachment A, if Respondents fail to perform under the terms of the Agreement. The Court further finds that the vacation of judgment is conditional on the agreement of the parties that if the Court determines that the Respondents have violated the terms of the Agreement, then the Court shall reinstate and enter the original judgment, attached to the motion as Exhibit D to Attachment A. Further, the vacation of the judgment is, and shall be, conditional on the agreement of the parties that if the Court determines that the Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment as provided, the Court shall enter the Judgment attached to the motion as Exhibit E to Attachment A. The Court further finds that the Respondents reserve their right to appeal if the judgment is reinstated or the new Judgment is entered. The Court further finds that the motion should be granted.

It is therefore, ORDERED, ADJUDGED, and DECREED that the judgment entered by this Court on August 22, 1990, in the above-styled and numbered cause be, and the same hereby is, vacated subject to being reinstated if the Respondents fail to perform the requirements of the Agreement attached to the motion as Attachment A, or, in the alternative, if the Court determines that the Respondents have violated the terms of the Agreement, and determines that it is unable to reinstate the judgment, the entry of the new judgment attached to the motion as Exhibit E to Attachment A.

SIGNED and ENTERED this 14th day of November, 1991.

/s/
JUDGE JOSEPH HART
250th Judicial District

APPROVED AS TO FORM AND SUBSTANCE:

NUECES COUNTY ATTORNEY
Nueces County Courthouse
901 Leopard, Room 206
Corpus Christi, Texas 78401-3680
(512) 888-0206

By: /s/
Carlos Valdez
State Bar No. 20426250

ATTORNEYS FOR NUECES COUNTY

BICKERSTAFF, HEATH & SMILEY
98 San Jacinto Blvd., Suite 1800
Austin, Texas 78701-4039

By: /s/
Ann Clarke Snell
State Bar No. 18788500

By: /s/
Steve Bickerstaff
State Bar No. 02293800

ATTORNEYS FOR INTERVENORS

ATTORNEY GENERAL OF TEXAS
DAN MORALES

WILL PRYOR
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(512) 463-2080

By: /s/
Dan Morales
State Bar No. 14417450

ATTORNEYS FOR RESPONDENTS

APPENDIX GG

SETTLEMENT AGREEMENT IN HARRIS COUNTY, ET AL. V. THE STATE OF TEXAS, ET AL., NO. 475,468 IN THE 126TH DISTRICT OF TRAVIS COUNTY, TEXAS

AGREEMENT

WHEREAS, overcrowding in the Institutional Division of the Texas Department of Criminal Justice, and its predecessor, the Texas Department of Corrections (hereinafter collectively referred to as the "Institutional Division") has contributed to the cost to the Plaintiff/Relator Harris County and the Intervenor Montgomery County (hereinafter sometimes referred to as the "Counties") of confining persons who have received a judgment and sentence ordering confinement in the Texas Department of Criminal Justice following conviction of felony, revocation of probation, parole, or release on mandatory supervision for whom paperwork and processing required for transfer has been completed (hereinafter "state-sentenced inmates") prior to their transfer to the Institutional Division; and

WHEREAS, in the future Harris County and Montgomery County are likely to continue incurring the costs of confining state sentenced inmates prior to their transfer to the Institutional Division; and

WHEREAS, House Bill 93 of the Seventy-Second Legislature in the Second Called Session (hereinafter "H.B. 93") has been offered as a mechanism whereby the information of the criminal justice system can begin to take place while, in the meantime, providing partial compensation to Harris County and Montgomery County for confining state-sentenced inmates prior to their transfer to the Institutional Division; and

WHEREAS, the parties desire to settle and compromise the judgment obtained by Harris County and Montgomery

County against the Respondents in Harris County v. State of Texas, et al, cause number 475,468 in the 126th Judicial District Court of Travis County, Texas (hereinafter the "suit"); and

WHEREAS, the parties desire to reach an agreement in the suit which would be enforceable in the courts, but would not, unfairly, limit the ability of the State of Texas to operate and/or reform the criminal justice system;

NOW, THEREFORE, in order to induce Harris County and Montgomery County to settle and compromise the judgment obtained by Harris County and Montgomery County in the suit, the Respondents agree to:

1. Not later than the 32nd day after the effective date of Article 11 of H.B. 93 or the signing of this Agreement, whichever is later, the Texas Commission on Jail Standards (hereinafter the "TCJS") shall determine for the county jails of Harris County and Montgomery County, the number of inmates confined in the jail and confined in another county jail at a cost to the County on April 1, 1991, who were awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision, and for whom paperwork and processing required for transfer had been completed on that date. Harris County and Montgomery County are entitled to payment from the TCJS as compensation to the Counties for confining the number of inmates determined as ready for transfer under Section 499.123 of the Government Code, as amended by H.B. 93, at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates as determined by the provisions of Section 499.123(b) of the Government Code, as amended by H.B. 93.

In the event Harris County or Montgomery County has not made a record of the date the transfer paperwork required by Article 42.09 of the Code of Criminal Procedure was completed, they may use the date the judgment and sentence was signed by

a Judge. However, for purposes of payment under other provisions of the Agreement, Harris County and Montgomery County agree and are required to maintain a permanent record of the date the paperwork provided for by Article 42.09 of the Code of Criminal Procedure was completed and the inmate became eligible for transfer to the Institutional Division.

The TCJS shall make the payment under this subsection on or before January 15, 1992.

2. Not later than September 10, 1993, the TCJS shall determine for the county jails of Harris County and Montgomery County, the number of inmates confined in the jails on September 1, 1993, who were awaiting transfer to the Institutional Division following conviction of a felony, or revocation of probation, parole or release on mandatory supervision, and for whom paperwork and processing required for transfer had been completed on that date. Harris County and Montgomery County are entitled to payment from the TCJS as compensation to the Counties for confining the number of inmates determined as ready for transfer under this section at an amount per inmate to be determined by dividing into $11.5 million the total number of inmates as determined by the provisions of Section 499.123(d) of the Government Code, as amended by H.B. 93.

The TCJS shall make the payment under this subsection on or before January 15, 1994.

3. From the effective date of H.B. 93 until August 31, 1993, for each month in which the number of inmates confined in the Harris County or Montgomery County jail and confined in another county jail at a cost to Harris County or Montgomery County awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision for whom paperwork and processing required for transfer has been completed, as determined under Section 499.122 of the Government Code, as amended by H.B.

93, is greater than 50 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123 of the Government Code, as amended by H.B. 93, the TCJS shall pay to Harris County or Montgomery County for each inmate in excess of 50 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmates in excess of 210 percent of the April 1, 1991, number, for each day of confinement the sum of $30.

4. From September 1, 1993, until September 1, 1995, for each month in which the number of inmates confined in the Harris County or Montgomery County jail and confined in another county jail at a cost to Harris County or Montgomery County awaiting transfer to the Institutional Division following conviction of a felony, revocation of probation, parole or release on mandatory supervision for whom paperwork and processing required for transfer has been completed, as determined under Section 499.122 of the Government Code, as amended by H.B. 93, is greater than 25 percent of the number of such inmates confined in the jail on April 1, 1991, as determined under Section 499.123 of the Government Code, as amended by H.B. 93, the TCJS shall pay to Harris County or Montgomery County for each inmate in excess of 25 percent but less than or equal to 210 percent of the April 1, 1991, number for each day of confinement the sum of $20, and for each inmate in excess of 210 percent of the April 1, 1991, number, for each day of confinement the sum of $30.

5. If a state or federal court determines that conditions in the Harris County or Monomer County jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the Institutional Division is 20 percent or more of the total number of inmates in the jail, the TCJS shall transfer inmates from the jail to an appropriate jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring Harris County or Montgomery County into compliance with court orders or to reduce the

percentage of inmates in the jail awaiting transfer to the Institutional Division to less than 20 percent of the total number of inmates in the jail. The TCJS is liable to the Counties for payment of the costs of transportation for and maintenance of transferred inmates. The costs for maintenance of an inmate for which the TCJS is liable under this section are the actual costs, as determined by the agreement between the Texas Board of Criminal Justice (hereinafter the "TBCJ") and the officer or governing body authorized by law to enter in contracts. No payments will be withheld unless the TBCJ determines that Harris County or Montgomery County is not reasonably utilizing its available certified jail beds, and then only to the extent necessary to equal the cost of unutilized beds.

6. Payments made to Harris County and Montgomery County pursuant to the provision of paragraphs one and three shall be made by the TCJS from a special funds of at least $56,982,500 appropriated for that purpose for all counties of the State in the 1992-93 legislative biennium.

7. Payments made to Harris County or Montgomery County pursuant to the provision of paragraphs two and four shall be made by the TCJS from a special fund of at least $56,982,500 appropriated for that purpose for all counties of the State in the 1994-95 legislative biennium.

8. Nothing in this Agreement shall be construed to limit the Legislature's ability or responsibility to appropriate additional amounts for purposes of payments provided for in H.B. 93 or to limit the Counties' ability to enforce the provisions of H.B. 93 in a proceeding outside this suit.

9. Respondents agree to begin planning and construction of thirteen thousand three hundred (13,300) additional prison beds in the legislative biennium of 1992-93 with funds appropriated for that purpose by the Legislature. Respondents further agree (i) to begin construction of an additional twelve thousand (12,000) drug treatment beds in the 1992-93 biennium or (ii) to

being construction of at least an additional three thousand (3,000) drug treatment beds in the 1992-1993 legislative biennium and to begin construction of at least nine thousand (9,000) additional prison beds in the TDCJ system during the 1994-1995 legislative biennium. This obligation will be in addition to the obligation of the Respondents to complete construction and begin operation, in the legislative biennium of 1992-93, of the fifteen thousand (15,000) prison beds, for which funds have already been appropriated or obtained. The obligation to begin planning and constructing of the additional twenty-five thousand three hundred (25,300) prison and/or drug treatment beds during the 1992-93 biennium is contingent on the approval of the voters of S.J.R. No. 4, 72nd Legislature, 1st Called Session. However, no other provisions of this agreement, including, but no limited to, the provisions in paragraph 11, shall be contingent on the approval of the voters of S.J.R. No. 4, 72nd Legislature, 1st Called Session.

10. Respondents and the Counties agree that both parties have important roles and responsibilities in the efficient operation of the criminal justice system. Respondents acknowledge that the Institutional Division has the responsibility to accept state-sentenced inmates within a reasonable time once their paperwork and processing required for transfer has been completed. This agreement reflects an effort by both Respondents and the Counties to provide a framework within which the backlog of state-sentenced inmates in county jails can be cooperatively and successfully addressed over the term of this Agreement. Respondents and the Counties agree that it is their mutual objective to achieve a criminal justice system in which state sentenced inmates are admitted to the Institutional Division within a period less than 45 days after they are ready for transfer. In furtherance of that objective, this Agreement shall terminate prior to September 1, 1999, if Respondents accept state-sentenced inmates, on an average over one year, not later than the 15th day after the date on which all processing required for transfer has been completed. Respondents and the Counties agree that nothing in this Agreement shall be construed as an

acknowledgment, admission or acceptance by the Respondents of an obligation, duty or requirement to accept sooner than the 45th day after the date on which all processing required for transfer has been completed for an inmate confined in a county jail while under an order of commitment to the Institutional Division and that this paragraph is not intended to be an admission of liability in this suit, or in any other suit, and shall be of no effect in any further legal proceedings between Respondents and the Counties, or any other entity.

11. Respondents agree that on and after September 1, 1995, the Institutional Division will accept, no letter than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the Institutional Division.

12. Nothing in this Agreement shall be construed as an acknowledgment, admission, or acceptance by Harris County or Montgomery County of the reasonableness of a 45 day period prior to transfer of state-sentenced inmates to the Institutional Division. Nothing in this Agreement shall be construed as an acknowledgment, admission or acceptance by Harris County or Montgomery County of the reasonableness or constitutionality of the policy or practice of limiting the number of state-sentenced inmates being transferred to the Institutional Division to the number prescribed by the allocation formula.

13. Nothing in this Agreement shall be construed so as to require or obligate Respondents to increase the operational capacity of the Institutional Division as provided in paragraph 9 if Respondents can demonstrate that it is not necessary to increase operational capacity in order to, after September 1, 1995, accept, not later than the 45th day after the date on which all processing required for transfer has been completed, each inmate confined in a county jail while under an order of commitment to the Institutional Division.

14. The parties agree to execute the Agreed Motion to Vacate Judgment, Agreed Order Vacating Judgment, and Judgment attached hereto as Exhibits A, B, and C.

15. The parties agree to file the Agreed Motion to Vacate Judgment and Agreed Order Vacating Judgment attached as Exhibits A and B in the 126th Judicial District Court of Travis County, Texas.

The parties agree that the 126th Judicial District Court of Travis County, Texas, (hereinafter the "trial court") in this matter shall have continuing jurisdiction to determine whether the parties have complied with the provisions of this settlement Agreement.

In the event of the Respondents' nonperformance, Harris County and/or Montgomery County may move for reinstatement of the vacated judgment. If the trial court determines that the Respondents have violated the terms of this Agreement, the judgment will be reinstated and judgment will be entered for Harris County and/or Montgomery County. The amount due under the judgment will include the amounts due Harris County and/or Montgomery County as of April 30, 1991, as stated in the judgment, and the amounts due the Counties for confining state-sentenced inmates between May 1, 1991, and the date the judgment is reinstated, plus interest at the rate of ten percent (10%). The formula provided in the judgment for determining the amount of compensation due the Counties will be used in determining the amount due for the period from April 30, 1991, until the date the judgment is reinstated. Respondents will be entitled to an offset against the judgment amount for the amounts paid under this Agreement prior to the reinstatement of the judgment. The Respondents reserve their right to appeal the judgment if it is reinstated.

16. The parties agree that if the trial court determines that the Respondents have violated the terms of this Agreement, and the trial court determines that it is unable to reinstate the

judgment as provided for in paragraph 15, the parties agree that the new Judgment, attached hereto as Exhibit C, will be presented to the trial court for entry. Respondents will be entitled to an offset against the Judgment for the amounts paid under this Agreement prior to the entry of the Judgment. The Respondents reserve their right to appeal the judgment after it is entered.

17. If the vacated judgment is reinstated or the new Judgment is entered, Respondent's obligations pursuant to this Agreement are terminated.

18. It is agreed that the penalty for non-compliance with the Agreement by Respondents is reinstatement of the judgment rather than specific performance of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 of this Agreement or contempt sanctions. It is agreed that paragraphs 14, 15, 16, 17, 18, 19, 20, and 21 of the Agreement may be enforced by an action for specific performance.

19. It is agreed that the signing of this Agreement constitutes a written agreement that settles the suit as required by Sections 499.121 and 499.126 of the Government Code, as amended by H.B.93.

20. It is agreed that this Agreement is contingent on the Court of Appeals remanding the suit to the trial court for further proceedings, if necessary, and the trial court entering the Agreed Order Vacating Judgment attached hereto as Exhibit B.

21. This Agreement shall terminate September 1, 1999, unless a motion to reinstate the judgment has been filed or the judgment has been reinstated pursuant to the provisions in paragraph 15 above or the Judgment has been entered pursuant to the provisions in paragraph 16, in which case it terminates on reinstatement of the vacated judgment or entry off the new Judgment. It is further agreed by all parties herein that upon termination of the Agreement, other than by reinstatement of the

vacated judgment or entry of the new judgment, Harris County and Montgomery County will file a motion to dismiss with prejudice in the trial court.

22. The negotiation of the terms of this document shall not be admissible as evidence to prove intent of the parties or for any other purpose in any proceeding. This shall include but not be limited to previous drafts of this agreement, letters between the parties, oral statements by the parties in the negotiation of this document or any other communication between the parties.

The attorneys of record for the parties have hereunto signed their names with full power to bind their respective clients to this Agreement.

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APPENDIX HH

EXCERPTS FROM PLAINTIFFS'-APPELLEES' BRIEF (pp. 65-72) IN *ALBERTI, ET AL. v. THE SHERIFF OF HARRIS COUNTY, ET AL., v. ANN RICHARDS, THE GOVERNOR OF TEXAS, ET AL.*, FIFTH CIR. NOS. 91-2274-91-2210, 90-6034, 90-2441

h. Certification To Texas Supreme Court

If Judge Hart's rulings are not entitled to preclusive effect until they are set aside on appeal, then the proper procedure for this court to follow to respect the state's interest in obtaining state court resolution of state law issues while vindicating plaintiffs' constitutional rights, and the authority of federal courts to redress constitutional deprivations, would be for this court to certify to the Texas Supreme Court any unresolved questions of Texas law. Plaintiffs further submit that the court should certify certain state law questions to the Texas Supreme Court for the additional reason that, as a practical matter, no final resolution of this protracted litigation can ultimately be achieved until those issues are decided by the Texas courts. Certification presents the greatest promise for the quickest definitive resolution of these issues, thereby speeding considerably the date on which this tortuous litigation can finally come to an end.

At this point, three things are indisputably clear: (1) the Harris County jails are massively, unconstitutionally overcrowded; (2) there are sufficient cells available in other county jails throughout the state to alleviate the problem (at least for the time being); and (3) the only question is whether, and to what extent, state officials should be required to participate in paying for that temporary remedy (utilization of vacant cells in other counties) or otherwise assisting in the abatement of ongoing constitutional violations in the jails.

This case has been pending for over eighteen years. Yet, nobody disputes the fact that the mandates of the consent decree entered more than sixteen years ago still have not been achieved. Neither have the requirements of the supplemental orders entered by the district court in accordance with the reserved powers retained in the consent decree. Most importantly, no one denies that the Harris County detention facilities are currently grossly unconstitutional as a result of severe overcrowding. The only real issue at this point is whether, and to what extent, state officials have a duty to participate in eliminating these undeniably unconstitutional conditions.

While it is clear the county defendants have an obligation to eradicate unconstitutional conditions in the Harris County jails, it is less certain how much responsibility the state defendants bear, under state law, to participate in rectification of the problem by either removing state-ready inmates promptly from Harris County jails or paying the county for the cost of housing excess populations elsewhere.

Once a constitutional violation has been shown to exist, as it has in this case, the court must look to state law to determine which governmental officials are responsible for remedying the deficiency. *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986); *In Re Clements*, 881 F.2d 145, 154-155 (5th Cir. 1989). It is common ground in this case (and indeed, indisputable) that the county defendants have affirmative obligations under (a) the consent decree, (b) the constitution, and (c) state law, TEX. LOCAL GOV'T. CODE §§ 351.001 and 351.041; *In Re Clements*, 881 F.2d at 154; *Bush v. Viterna*, 795 F.2d at 1206, to provide and pay for constitutional jails for all persons confined in their facilities until they are transferred to the custody of the state defendants. The unresolved question here is whether, and to what extent, state officials also bear responsibility for rectifying unconstitutional conditions in illegally overcrowded county jails housing state-ready prisoners by promptly removing from such facilities inmates who have been sentenced to serve time in the custody of the Texas

Department of Criminal Justice - Institutional Division and are ready for transfer to state custody (or paying for the housing of such inmates elsewhere).

The reason there is uncertainty about this issue is that the Texas courts have not yet finally ruled on the meaning or scope of the Comprehensive Criminal Justice Reform Act passed by the legislature in 1989, TEX. GEN. & SPECIAL LAWS 1989, Reg. Sess. ch. 785, pp. 3470-3558 (H.B. No. 2335) in this context. Prior to September 1, 1989 (the effective date of H.B. 2335), Texas law had traditionally recognized a rather bright line dichotomy concerning the responsibilities of county and state officials for the housing of felony offenders: before conviction, such prisoners were the responsibility of county officials (the sheriff and the commissioners court); upon being sentenced to serve penitentiary time, the inmates were to be "speedily" transferred to the Texas Department of Corrections, TEX. REV. CIV. STAT. ANN. art 6166r (Vernon 1970) and became the responsibility of the state. Thus, prior to enactment of H.B. 2335, state law effectively vested exclusive responsibility for the constitutional housing of convicted felons in state officials.

In 1989, the Texas legislature fundamentally revised the relationship between the state and the counties with regard to the housing of convicted felons. While the TDCJ-ID[48] still has "primary" responsibility for the housing of convicted felons, TEX. REV. CIV. STAT. ANN. art 44113(401) § 1.02(a)(1) (Vernon Supp. 1991), there appears to have been a significant change in the extent of the state's duty to house such inmates. In the first place, the requirement that convicted felons be transferred to the TDCJ-ID "speedily" has been deleted from state law. More importantly, an elaborate mechanism, grounded in a complex formula, has been established to "allocate" among all the counties of Texas the finite number of prisoner spaces available within the TDCJ-ID. TEX. REV. CIV. STAT. ANN. art 6166a-4 (Vernon 1991). Each county is permitted to send to

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48 That is the new name for what used to be called the Texas Department of Corrections (TDC).

the TDCJ-ID a certain number of inmates each week, and that number is determined by a detailed formula devised by the legislature and implemented by the county defendants (the members of the Texas Board of Criminal Justice).

Recognizing that the number of admissions "allocated" to the counties would invariably be less than the numbers of persons historical sentenced to TDC, the legislature created a spectrum of intermediate sanctions[49] which the district courts could utilize in lieu of TDCJ-ID incarceration, and the state provided substantial funds to the counties to finance, at the local level, those alternatives to institutionalization in the penitentiary.[50]

Thus, on the face of it, Texas appears to have decided in 1989 to limit state responsibility for accepting sentenced inmates from the counties to the numbers derived from the allocation formula, to provide funds to the counties to pay for alternative intermediate sanctions, and to require the counties to bear the financial burden of housing any more prisoners in their facilities, including so-called state-ready inmates, themselves.

Not surprisingly, the counties balked at the state's apparent effort to shift a portion of the traditional burden of paying for the housing of state-ready inmates to the local governments. Two lawsuits were filed in state district court in Travis County asserting, in essence, that the state still has responsibility to remove state-ready prisoners promptly from the county jails, or to pay the counties the cost of incarcerating them in local facilities pending transfer to the TDCJ-ID, even after enactment of H.B. 2335. *County of Nueces v. Texas Board of*

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49 Boot camps, super-intensive probation, residential probation centers, and electronically monitored home detention are examples of the kinds of intermediate, non-penitentiary punishments specifically sanctioned by the legislature.

50 The statewide budget for funding H.B. 2335 programs from September 1, 1990 through August 31, 1991, was $50 million. Harris County's share of that fund was approximately $10 million.

Corrections, No. 452,071 (Dist. Ct. of Travis Co., 126th Judicial Dist. of Tex.); *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Judicial Dist. of Tex.). In both of those cases, state district court Judge Joseph Hart ruled in favor of the counties and concluded that the state officials continue to have a duty, under Texas law, even after passage of H.B. 2335, to take all convicted felons from the counties promptly or pay for the cost of housing state-ready inmates in local facilities.[51] In essence, the state defendants must either "take or pay" according to Judge Hart.

Ever since enactment of H.B. 2335, uncertainty concerning its meaning and the extent to which it relieved state officials of responsibility for state-ready prisoners, have prevented comprehensive resolution of the *Alberti* case. Everybody acknowledges that Harris County detention facilities are unconstitutional due to massive overcrowding. The state defendants claim, however, that the sole responsibility to cure those deficiencies rest wholly with county officials (as a result of enactment of H.B. 2335), while the county defendants unswervingly insist that since the current overcrowding is in large part the result of the state defendants' failure promptly to remove state-ready prisoners from the local jails, the state should effect the remedy, notwithstanding passage of H.B. 2335.[52]

This routine has gone on for more than a year and a half now. At every opportunity, the state defendants cite the passage from *Bush v. Viterna*, 795 F.2d at 1209, to the effect that the

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51 The Nueces County case is winding its way through the state appellate system. The state's opening brief was filed on March 29, 1991; the appellees' brief will be due on April 29, 1991, if no extension of time is requested or granted. In the Harris County case, Judge Hart granted summary judgment in favor of the county as to liability. Since the parties have been unable to agree to the per diem costs of incarcerating prisoners in Harris County, trial on that "damages" issue has been set for May 13, 1991.

52 The county defendants argue that, other than providing a few dollars for some locally based programs, H.B. 2335 really did not effectuate a significant change in prior law concerning the state's traditional responsibility with regard to state-ready prisoners.

state has "virtually complete freedom to decide who will be responsible" for discharging constitutional obligations, and claim that the legislature, in enacting H.B. 2335, did just that and opted to delegate to the counties exclusive responsibility for the housing of state-ready inmates in constitutional facilities (at least until there is room in the ID to accept them into state custody), and assert that, therefore, they have been relieved, by state law, from any duty to participate in effectuating a remedy for the admittedly unconstitutional conditions in the Harris County jails. Invariably, the county defendants respond that the state officials misapprehend the real meaning and import of H.B. 2335 and that state officials are still primarily obligated, under Texas law, to remove state-ready inmates promptly from the Harris County jails, at least where leaving the prisoners in that terribly overcrowded facility subjects them to unconstitutional privations and violates rights secured by the eighth and fourteenth amendments to the constitution of the United States.

Meanwhile, plaintiffs languish in horrible conditions which no one suggests comport with constitutional standards and no one denies pose serious threats to the health, safety, welfare, and, indeed, lives of the inmates condemned to be warehoused there, as well as the public at large.

It is apparent that no real, final comprehensive remedy will be achieved in this case until the Texas courts sort out the uncertainties existing in Texas law and determine definitively, and decisively, the scope of the state officials' responsibility, under Texas law, to remove state-ready prisoners from unconstitutional county jails. Until that state law determination is made, this litigation is, effectively, on a tread mill and no permanent solution to this protracted case and the seemingly never-ending problems of overcrowding in the Harris County jails can realistically be effected.

Accordingly, plaintiffs propose that this court certify to the Texas Supreme Court, under TEX. R. APP. P. 144 and TEX. CONST. 145 V § 3-c, the following questions:

a. Does Texas law impose on state (as opposed to county) officials a duty promptly to remove from unconstitutionally overcrowded county jails prisoners who have been convicted of felony offenses and sentenced to serve time in the custody of the Texas Department of Criminal Justice-Institutional Division in excess of the numbers of inmates required to be accepted into the TDCJ-ID weekly pursuant to the allocation formula promulgated pursuant to TEX. REV. CIV. STAT. ANN. art 6166a-4 (Vernon 1991)?

b. Assuming that the answer to the foregoing question is yes, does Texas law require or authorize funds from the state treasury to be utilized to pay the cost of housing excess state-ready prisoners in available cells in county jails, where state officials have declined (or are unable) to receive such inmates into the TDCJ-ID as a result of that facility being populated to the maximum extent allowed by law?

Those questions are decidedly ones which should be addressed by the Texas Supreme Court in the first instance. There is obviously no clearly controlling Texas precedent (other than Judge Hart's rulings, which are on appeal or interlocutory), and the matters are truly issues of first impression in this state. The principles of comity and federalism counsel in favor of permitting the courts of the state of Texas the opportunity to answer these crucial issues of state law, instead of the federal courts trying to divine what Texas courts might ultimately do with them so long as plaintiffs' constitutional rights are not continually violated in the meantime (i.e. federally ordered relief proceeds).

If the certification process has any role in preserving the federal-state balance, certainly this case presents the ideal occasion for the federal court to seek definitive guidance from the highest court of the state on these state law questions in

these areas of such great importance to the public policy and interest of the state.[53]

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53 Of course, referral of these questions to the Texas Supreme Court must not delay relief to the plaintiff class in any respect. Rather, the court should command the district court to order the defendants to take whatever steps are necessary to achieve needed reductions in county jail populations, including housing excess populations in vacant cells in other counties, even while the certification process is going on. No principle of comity or federalism, or other consideration, would permit the intolerable conditions currently existing in the Harris County jails to continue and persist while the Texas Supreme Court sorts out the unsettled questions of Texas law concerning which level of government (state or county) should pay for the remedy.

APPENDIX II

S.B. 24, 1ST CALLED SESSION, 72ND TEXAS LEGISLATURE (1991) UNAPPROVED CONFERENCE COMMITTEE REPORT (IN PERTINENT PART)

A BILL TO BE ENTITLED

S.B. No. 24

AN ACT

relating to the efficient operation of the state criminal justice system, including the punishment of offenses, probation and parole, criminal justice services and facilities, and the issuance of general obligation bonds for acquiring, constructing, or equipping certain of those facilities.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

[p 1]

* * * * *

SECTION 14.02. Chapter 499, Government Code, as revised by Chapter 16, Acts of the 72nd Legislature, Regular Session, 1991, is amended by adding Subchapter F to read as follows:

SUBCHAPTER F. PROCEDURES FOR REDUCING COUNTY JAIL BACKLOG

[p. 32]

* * * * *

Sec. 499.123. PAYMENT * * * * *

(b) The Commission on Jail Standards shall pay the actual costs incurred by a qualifying county for the transfer of inmates from the county jail to other correctional facilities, for the period beginning on February 7, 1991, and ending on October 1, 1991, if the inmates are transferred after a determination by a court that conditions are unconstitutional or if during that period the percentage of inmates in the jail awaiting transfer to the

institutional division was 20 percent or more of the total number of inmates in the jail at any time.

[p. 34]

* * * * *

Sec. 499.125. TRANSFER OF FELONY BACKLOG. (a) If a state or federal court determines that conditions in a county jail are unconstitutional, and if on or after October 1, 1991, the percentage of inmates in the jail awaiting transfer to the institutional division is 20 percent or more of the total number of

[p. 35]

inmates in the jail, the commission shall transfer inmates from the jail to a qualified jail, detention center, work camp, or correctional facility, but only to the extent necessary to bring the county into compliance with court orders or to reduce the percentage of inmates in the jail awaiting transfer to the institutional division to less than 20 percent of the total number of inmates in the jail.

[p. 36]

* * * * *

Supreme Court, U.S.
FILED
JUN 01 1993
OFFICE OF THE CLERK

No. 92-1648

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ANN RICHARDS, Governor of Texas; CAROL S. VANCE, JERRY H. HODGE, JOSHUA W. ALLEN, SR., ELLEN J. HALBERT, CLARENCE N. STEVENSON, ALLAN B. POLUNSKY, R. H. DUNCAN, SR., GILBERTO HINOJOSA, JOHN R. WARD, Members, Texas Board of Criminal Justice; JAMES A. LYNAUGH, Executive Director, Texas Department of Criminal Justice,

Petitioners,

vs.

LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE J. PINA, II, PAT REED, WESLEY SELLERS, Individually and on behalf of all others similarly situated,

Inmate Respondents,

and

JON LINDSAY, HARRIS COUNTY JUDGE; EL FRANCO LEE, JIM FONTENO, STEVE RADACK, JERRY EVERSOLE, Harris County Commissioners; JOHNNY KLEVENHAGEN, Harris County Sheriff,

County Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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COUNTY RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Harris County Judge Jon Lindsay, Harris County Commissioners El Franco Lee, Jim Fonteno, Steve Radack and Jerry Eversole ("County Respondents") do not concur with Petitioners' statement of "Questions Presented." County Respondents urge that the following constitutes an accurate presentation of the substantive questions presented by Petitioners in their Petition for Writ of Certiorari:

1. Whether a federal district court is authorized to fashion a remedy upon finding violations of constitutional rights?

2. Whether the Eleventh Amendment shields state officials who act contrary to the United States Constitution from prospective injunctive relief ordered by a federal district court because of ancillary costs.

3. Whether a federal district court can rely on the pronouncement of state law by a state trial court to fashion a remedy.

4. Whether a federal district court abuses its discretion by refusing to abstain when state law is clear and important constitutional rights are at issue.

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No. 92-1648

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

ANN RICHARDS, Governor of Texas; CAROL S. VANCE, JERRY H. HODGE, JOSHUA W. ALLEN, SR., ELLEN J. HALBERT, CLARENCE N. STEVENSON, ALLAN B. POLUNSKY, R. H. DUNCAN, Sr., GILBERTO HINOJOSA, JOHN R. WARD, Members, Texas Board of Criminal Justice; JAMES A. LYNAUGH, Executive Director, Texas Department of Criminal Justice,

Petitioners,

vs.

LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE J. PINA, II, PAT REED, WESLEY SELLERS, Individually and on behalf of all others similarly situated,

Inmate Respondents,

and

JON LINDSAY, HARRIS COUNTY JUDGE; EL FRANCO LEE, JIM FONTENO, STEVE RADACK, JERRY EVERSOLE, Harris County Commissioners; JOHNNY KLEVENHAGEN, Harris County Sheriff,

County Respondents.

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

COUNTY RESPONDENTS' BRIEF IN OPPOSITION

County Respondents (hereinafter "County Defendants") respectfully request that this Court deny Petitioners' (hereinafter "State Defendants") Petition for Writ of Certiorari, which seeks review of the Fifth Circuit's opinion in *Alberti v. Sheriff of Harris County v. Richards*, 978 F.2d 893 (5th Cir. 1992) *(per curiam) (Alberti II)*.

OPINIONS BELOW

State Defendants' summary of the opinions rendered below mischaracterizes the underlying district court and Fifth Circuit orders as orders requiring state officials to "compensate" Harris County.[1] Rather, these orders found State Defendants liable for present and continuing violations of Inmate Respondents' (hereinafter "Inmate Plaintiffs") constitutional rights through state officials' continuing refusal to accept Inmate Plaintiffs into the State's penitentiary system.

State Defendants' summary of opinions below fails to include the state court opinions upon which the United States District Court for the Southern District of Texas partially based its prospective injunctive remedial relief, and upon which the Fifth Circuit affirmed that relief.[2] These opinions are included in County Defendants' Appendices A-H.

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1 State Defendants' Apr. 12, 1993 Petition for Writ of Certiorari (hereinafter "State Defendants' Petition II") at 2; State Defendants' Jan. 17, 1992 Petition for Writ of Certiorari at 1 (S.Ct. No. 91-1202) (hereinafter "State Defendants' first petition" or "State Defendants' Petition I") at 1. The Appendix filed with State Defendants' Petition II is referenced as "State Defendants' Appendix II". The Appendix filed with State Defendants' Petition I is referenced as "State Defendants' Appendix I".

2 The lower courts' orders were also based upon Texas statutes which, *inter alia*, require that convicted felons shall be imprisoned in the Texas Department of Criminal Justice's Institutional Division (hereinafter "TDCJ-ID"), the state's penitentiary system. TEX. PENAL CODE ANN. §12.31(a) (Vernon Supp. 1992); TEX. PENAL CODE ANN. §12.32(a) (Vernon Supp.

JURISDICTION

Through the instant Petition for Writ of Certiorari, State Defendants are essentially seeking to obtain a redetermination of a substantially similar (and for the most part identical) Petition for Certiorari filed by them and denied by this Court last year in *Alberti v. Sheriff of Harris County v. Richards*, 937 F.2d 984 (5th Cir. 1991) *(Alberti I), cert. denied sub nom., Richards v. Lindsay*, 112 S.Ct. 1994 (1992).

TEXAS CONSTITUTIONAL AND STATUTORY PROVISIONS OMITTED BY STATE DEFENDANTS

State Defendants' list of "Constitutional and Statutory Provisions Involved" misdirects this Court's attention to irrelevant statutes, rather than citing the statutory provisions which the courts relied upon in finding that State Defendants violated their state and constitutional duty to accept convicted felons sentenced to imprisonment into TDCJ-ID.[3]

1992); TEX. PENAL CODE ANN. §12.33(a) (Vernon 1974); TEX. PENAL CODE ANN. §12.34(a) (Vernon Supp. 1992); TEX. PENAL CODE ANN. §12.42 (Vernon 1974 & Supp. 1992); TEX. CRIM. PROC. CODE ANN. art. 42.09 §§1-4 (Vernon Supp. 1992); TEX. REV. CIV. STAT. ANN. art. 6166r (in effect from 1927 - August 31, 1989) (recodified at TEX. GOV'T CODE ANN. §499.006 (Vernon 1990) and later recodified at TEX. GOV'T CODE ANN. §500.006 (Vernon Supp. 1992)); TEX. GOV'T CODE ANN. §493.001 (Vernon Supp. 1992) (formerly TEX. REV. CIV. STAT. ANN. 4413(401) §1.02(a)); TEX. GOV'T CODE ANN. §494.001(a) (Vernon Supp. 1992) (formerly TEX. GOV'T CODE ANN. §494.001(a) (Vernon 1990)); TEX. GOV'T CODE ANN. §495.004 (Vernon Supp. 1992) (formerly TEX. GOV'T CODE ANN. §494.004 (Vernon 1990)). These statutes are attached as County Defendants' Appendix L.

3 *See* n. 2 & County Defendants' Appendix L.

STATEMENT OF THE CASE

County Defendants adopt the factual and procedural history set forth in *Alberti I*, which is substantially accurate.[4] State Defendants' Petition is rife with misstatements of the facts, procedural history and law relating to this case. Even after the Fifth Circuit's opinion in *Alberti I* memorialized several instances where State Defendants mischaracterized the holdings of the United States District Court for the Southern District of Texas in this case,[5] State Defendants continue to mischaracterize the nature of this suit, as well as the actions taken by the district court, by the Fifth Circuit and by this Court.

For example, State Defendants admit that this Court denied certiorari last year in this same case on the same issues involving the same parties, then attempt to explain away their refiling of the same rehashed petition by stating that it "is now ripe for review" and that their previous petition was "filed as a precautionary measure" and "could well have been judged premature".[6] This Court, however, did not find State Defendants' first petition to be premature. Instead, this Court denied State Defendants' motion to defer consideration of their first petition and denied certiorari on the merits in *Richards v. Lindsay*, 112 S.Ct. 1994 (1992).[7]

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4 *See Alberti I*, 937 F.2d at 986-992 [State Defendants' Appendix II at C1-C12, C15, C20-C21].

5 *See e.g., Alberti I*, 937 F.2d at 1001 & n. 8 [State Defendants' Appendix II at C28-C29 & n. 8].

6 *See* State Defendants' Petition II at 4-5 & n. 1 (*citing, Brotherhood of Locomotive Fireman & Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328, 88 S.Ct. 437, 438, 19 L.Ed.2d 560 (1967)).

7 *Compare, Brotherhood of Locomotive Fireman & Enginemen*, 88 S.Ct. at 438 (wherein this Court explicitly found that case was not ripe for review when denying certiorari).

In addition, the opening paragraph of State Defendants' "Statement of the Case" (in State Defendants' Petitions I and II) took three words used by the Fifth Circuit in its *Alberti I* opinion out of context and thereby misstated the very foundation of the Fifth Circuit's *Alberti I* and *Alberti II* opinions. According to State Defendants' Petitions:

> This controversy swirls around whether Texas prison officials and the Governor of Texas (hereinafter "State Defendants") bore any liability, especially financial liability, for felons sentenced to the state prison system but confined and maintained in the Harris County jail. State Defendants do not dispute the Fifth Circuit's analysis that this is *"exclusively"* a state law issue and that it presented a "hard question" for the court.[8]

Contrary to State Defendants' representations, the Fifth Circuit did not find that State Defendants' liability "exclusively" presented a state law issue which in turn presented a "hard question" for the court. Drawing from the Fifth Circuit's decision in *Bush v. Viterna*, Judge Patrick Higginbotham outlined the three-pronged analysis undertaken by the Fifth Circuit when enforcing constitutional standards under *42 U.S.C. §1983*:

> Whenever a plaintiff alleges a cause of action under §1983, a federal court must ask three questions. First, is a federal secured right

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8 State Defendants' Petition II at 4 (emphasis in Petition) (*citing Alberti I*, 937 F.2d at 994) [State Defendants' Appendix II at C15]; *Id.* at 7, 9, 16, 19, 21; State Defendants' Petition I at 3, 4, 14, 17 & 18-19.

> involved .... Second, was the alleged deprivation of the right accomplished by state action? ... Finally, who is the state actor responsible for the violation? *Unlike the first two questions*, the third question turns *exclusively* on state law .... The *hard question* in this appeal is the third question, the issue of who is liable for the conditions in the county's jails.[9]

State Defendants' representations raise the *Pennhurst*[10] specter while ignoring the first two questions outlined by the Fifth Circuit, ignoring the Fifth Circuit's analysis of their liability for deprivations of Inmate Plaintiffs' federal constitutional rights under *Stewart v. Winter*, *Benjamin v. Malcolm*, and *Tate v. Frey*, and ignoring the Fifth Circuit's explicit rejection of their contention that their duties only arose pursuant to state law.[11]

On virtually every page of their instant petition (as in their first petition), State Defendants wrongly attempt to portray *Alberti* as a "fiscal dispute" between two governmental entities, rather than a case in which they were found directly liable for

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9 *Alberti I*, 937 F.2d at 994 *(emphasis added in part)* [State Defendants' Appendix II at C15] (*citing*, *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986)).

10 *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 97 L.Ed.2d 67 (1984).

11 *Alberti I*, 937 F.2d at 993-997 [State Defendants' Appendix II at C14-C22] (*citing*, *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied sub nom*, *Cuomo v. Koehler*, 480 U.S. 910, 107 S.Ct. 1358, 94 L.Ed.2d 528 (1987); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984)). *Compare*, State Defendants' Petition II at 4; State Defendants' Petition I at 3-4.

continuing violations of Inmate Plaintiffs' Eighth Amendment rights. The Fifth Circuit succinctly rejected this misleading "fiscal" argument in *Alberti I*, stating:

> The state also makes a general federalism argument, suggesting that `[a] federal court has no jurisdiction (no power) to act as arbiter between different levels of a State's government that are in dispute.' Again, this argument mischaracterizes the action; the state is responsible for a federal constitutional violation.[12]

Alberti is neither a suit seeking the recovery of monetary damages, nor a suit between different levels of state government, nor a suit based upon State Defendants' violations of state law.[13] Instead, this is a class action civil rights case filed in 1972 under 42 U.S.C. §1983 and the Eighth and Fourteenth Amendments by pretrial and convicted misdemeanants and felons incarcerated in the Harris County jail facilities, contesting the conditions of their confinement.

In February, 1987, County Defendants filed a motion for Final Judgment in *Alberti*, urging that they were in compliance with the district court's remedial orders and that the conditions of confinement in the jail facilities were constitutional. After reviewing the facilities, court-appointed monitors determined that "as of June 1, 1987, the County's facilities were five percent

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12 *Alberti I*, 937 F.2d at 1001-02 n. 8 [State Defendants' Appendix II at C29-C30 n. 8].

13 *Compare*, State Defendants' Petition II at *i*, 2, 4-9, 14-17 & 20; State Defendants' Petition I at *i*, 1, 3-6, 10, 11, 14 & 24. The sheer number of misstatements made in State Defendants' "Statement of the Case," as well as the balance of their Petition, has forced County Defendants to address them in Section "V".

over capacity."[14] Citing County Defendants' renovation of their 301 San Jacinto Jail facility, construction of a new 4,000-bed downtown jail, and design of a Criminal Justice Center, the *Alberti* monitors stated, "[u]nlike most jurisdictions around the country prodded to reform by judicial intervention, the defendants are not content to rest on their laurels until the next crisis emerges, but instead have moved aggressively and efficiently to anticipate future needs."[15] According to the monitors, "[w]hile the task is not yet complete, the distance already covered [by County Defendants] is vast, and a finish line is discernible."[16]

Since September, 1987, however, State Defendants have refused to timely accept convicted felons ready for transfer (hereinafter "prison-ready felons") into the state prison system, thereby causing severe overcrowding in the Harris County Jail facilities. In 1989, Inmate Plaintiffs and County Defendants joined State Defendants (in their official capacities) as Defendants and Third Party Defendants in the *Alberti* case, seeking to enjoin State Defendants to remove all prison-ready felons from the Harris County Jail facilities, and to continue thereafter to remove them.[17] Contrary to State Defendants'

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14 *Alberti* Monitors' Oct. 7, 1987 Findings & Recommendations at 28.

15 *Id.* at 80-81.

16 *Id.* at 92.

17 State Defendants complain that the Inmate Plaintiffs sued them after the second trial on liability. State Defendants' Petition II at 7 n. 2. In *Alberti I*, the Fifth Circuit rejected this claim, noting that State Defendants were parties to the action (Third Party Defendants) during the liability trials, that they failed to explain how their trial strategy would have differed had they been Defendants, and that they failed to demonstrate prejudice and error. *Alberti I*, 937 F.2d at 1003 [State Defendants' Appendix II at C33; State Defendants' Appendix I at A39]. State Defendants did not raise this complaint in their first

attempts to suggest otherwise, neither Inmate Plaintiffs nor County Defendants sought any monetary relief from State Defendants.[18]

After a bench trial in August, 1989, and hearings in September, 1989, the district court issued its September 25, 1989 Findings of Fact and Conclusions of Law, finding that State Defendants caused and were responsible for the overcrowding in the Harris County Jail facilities--the essential element in its finding that the jail facilities were unconstitutional. In particular, the district court held that "extreme overcrowding is the primary cause of the conditions of confinement listed below that inmates must endure at the Harris County Jail facilities," that State Defendants "caused the overcrowding crisis in the Harris County Jail facilities," that the jail "conditions are cruel and unusual in violation of Plaintiffs' Eighth and Fourteenth Amendment rights," that State Defendants' "refusal to accept convicted felons ready for transfer to TDC has caused those inmates to suffer cruel and unusual punishment in the Harris County Jail facilities," that State Defendants' "refusal to accept all convicted felons ready for transfer from the jail prevented County Defendants from fully complying with this Court's orders," and that the overcrowding conditions in the jail facilities had reached crisis proportions."[19]

Thereafter, the district court issued injunctive remedial orders at issue in State Defendants' first petition, requiring both County Defendants and State Defendants to limit the numbers of

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petition for certiorari seeking discretionary review of *Alberti I* and thus waived it.

18 County Defendants' Appendix I & J.

19 State Defendants' Appendix II at Y4, Y17, Y21 & Y22; State Defendants' Appendix I at X4, X17, X22.

county and state prisoners in the Harris County Jail facilities.[20] The details of any necessary reductions in prisoner populations made by County Defendants and State Defendants pursuant to the order were left to the defendants' discretion. The order set caps on both the "county" and "state" prisoner populations in the jail, ordered the transfers of prison ready felons to other county jail facilities if either population exceeded the cap, and imposed liability for the ancillary costs of those transfers upon the party (either State or County) exceeding its cap.[21] The remedial orders thus gave State Defendants a choice of limiting the prison-ready population within the Harris County Jail facilities to 1,575 prison-ready felons, taking any steps consistent with state law or federal court orders to reduce the prison-ready felon population, or paying the ancillary costs of housing prison-ready felons above their cap in other Texas county detention facilities.[22] Recognizing that County Defendants and State Defendants, as well as many other Texas counties, were litigating the duty and reimbursement issues in state court, the district court noted that its costs assessment was tentative and preliminary and would be finalized contingent on the outcome of pending litigation.[23]

In *Nueces County v. Texas Board of Corrections* and *Harris County v. Texas*, Judge Joseph Hart rejected each of the

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20 When citing the district court's February 7, 1991 injunctive remedial order, State Defendants wrongly infer that they alone bore the burden of any transfers of prison-ready felons to other county jail facilities. State Defendants' Petition II at 7; State Defendants' Petition I at 5.

21 State Defendants' Appendix II at U6-U7; State Defendants' Appendix I at R6-R7.

22 State Defendants' Appendix II at U6-U8; State Defendants' Appendix I at R6-R8.

23 State Defendants' Appendix II at U7; State Defendants' Appendix I at R7.

arguments State Defendants make in the instant petition (and well as in their first petition), and held that State Defendants had a duty to accept prison-ready felons under state law or pay for their upkeep in the county jails.[24] Given State Defendants' failure to timely accept their prison-ready felons into the state's penitentiaries, the state district courts ordered them to take their prisoners or to reimburse the counties for housing prison-ready felons. After final judgment had been entered in these state lawsuits, the State Defendants compelled the county litigants to settle their lawsuits, thereby precluding state appellate review of those judgments. In House Bill 93, the State Legislature essentially codified the state court reimbursement holdings and adopted the *Alberti* district court's transfer remedy. Pursuant to this statute, State Defendants are required to reimburse Texas counties for the costs of housing the state's prison-ready felons left in the counties' jails and must pay for transfers of prison-ready felons to other county jail facilities, given overcrowded conditions.[25]

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24 *See* orders entered in Civil Action No. 452,071; *County of Nueces, Texas, et al. v. Texas Board of Corrections* (250th Judicial District Court of Travis County, Tex.); Civil Action No. 475,468; *Harris County, Texas, et al v. State of Texas* (126th Judicial District Travis County, Tex.), at County Defendants' Appendix at A-H. *See also, Tarrant County Commissioners Court v. Markham*, 779 S.W.2d 872, 874-75 (Tex. App.-Fort Worth, writ denied 1989) (wherein Texas' Second Court of Appeals observed that "[t]he sad truth is that the State of Texas fails to meet its obligations to incarcerate convicted felons because of the state's settlement agreement in the well known *Ruiz* case ... The unhappy result is that there are two prison systems in Texas. One is operated 'on the books' by T.D.C. and appears to meet the state's obligations under *Ruiz*. This prison system is financed by the State of Texas out of the state budget. The second prison system is less visible to the public eye; but it exists in increasingly overcrowded county jails. In this system, inmates who have been committed to T.D.C. by state courts are forced to languish in jails of the various counties throughout the state, because of the state's failure to accept the inmates committed to T.D.C.... These county jails were not designed to house convicted felons who have been committed to T.D.C. for relatively long periods of time.").

On July 25, 1991, the Fifth Circuit rendered its opinion in *Alberti I*, which consisted of several consolidated appeals.[26] In *Alberti I*, the Fifth Circuit held, *inter alia*, that State Defendants could not disclaim responsibility for violations of Inmate Plaintiffs' Eighth Amendment rights in the Harris County Jail facilities by refusing to accept those who were committed by law to confinement in TDCJ-ID.[27] Upon examination of the record, the Fifth Circuit observed that "[w]e would, by necessity, affirm a finding that the state was deliberately indifferent. Indeed, such a finding on this record would be

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25 Tex. Gov't. Code Ann. §§499.123 & 499.125 (Vernon Supp. 1992).

26 *Alberti v. Sheriff of Harris County*, 937 F.2d 984 (5th Cir. 1991) (*Alberti I*) (State Defendants' Appendix II at C; State Defendants' Appendix I at A). The consolidated appeals related to County Defendants' and State Defendants' appeals of the district court's September 25, 1989 Findings of Fact and Conclusions of Law (State Defendants' Appendix II at Y; State Defendants' Appendix I at X); County Defendants' appeal of the district court's October 23, 1989 order denying their motion to amend or supplement the September 25, 1989 Findings and Conclusions or for a New Trial (State Defendants' Appendix II at X; State Defendants' Appendix I at W); County Defendants' and State Defendants' appeals of the district court's April 5, 1990, September 7, 1990, February 7, 1991 and March 15, 1991 injunctive remedial orders (State Defendants' Appendix II at S, U, V & W; State Defendants' Appendix I at P, R, U & V); County Defendants' appeals of the *Ruiz* Court's February 7, 1991 and March 15, 1991 advisory opinions (State Defendants' Appendix II at R & T; State Defendants' Appendix I at Q & S), State Defendants' appeal of the district court's April 22, 1991 and November 19, 1990 remedial orders (State Defendants' Appendix II at Q; State Defendants' Appendix I at O & T) and State Defendants' Petition for Writ of Mandamus, Motion to Stay the district court's May 28, 1991 Order and Motion to Stay and/or Petition for Writ of Prohibition, filed in the Fifth Circuit on or about March 5, 1991, June 5, 1991 and July 25, 1991. The orders found at State Defendants' Appendix II at E-I and J-P and State Defendants' Appendix I at D-N were not part of the consolidated appeal decided on July 25, 1991.

27 *See generally, Alberti I*, 937 F.2d at 985-1004 [State Defendants Appendix II at C].

virtually unassailable."[28] The Fifth Circuit, however, found that "[i]n light of the increase in the population of ready-felons over such a short period of time, we cannot conclude from the record as it now stands that the county has deliberately ignored the needs of its inmates or that its delay in accommodating the overcrowding has been `inordinate.'"[29] Given this Court's intervening decision in *Wilson v. Seiter, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)*, the Fifth Circuit remanded *Alberti I* for a determination of whether the State Defendants and County Defendants had acted with deliberate indifference.[30]

On August 7, 1991, on remand of *Alberti I*, the district court issued findings of fact, determining that "the State defendants' and to a much lesser degree, the County defendants' awareness of the extremely cruel conditions in the county facilities and their failure to take steps to remedy those conditions constitutes deliberate indifference as required by *Seiter*."[31]

On October 22, 1991, the Fifth Circuit denied State Defendants' Petition for panel rehearing of *Alberti I*, finding that neither House Bill 93 nor the settlement of *Harris County v. State of Texas* changed the legal relationship between the state and counties in such a manner as to require it to reconsider its earlier opinion or the district court's reimbursements made to Harris County.[32]

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28 *Alberti I*, 937 F.2d at 1000 [State Defendants' Appendix II at C26].

29 *Id.*.

30 *Alberti I*, 937 F.2d 984, 986, 993, 1000 [State Defendants' Appendix II at C1-C2, C13, C-34.]

31 State Defendants' Appendix II at O.

32 *See generally*, State Defendants' Appendix II at D; State Defendants' Appendix I at B.

On January 17, 1992, State Defendants filed a Petition for Writ of Certiorari relating to *Alberti I*, raising substantially similar (and, in most respects, identical) questions and arguments which they now seek to reincarnate through State Defendants' Petition II. State Defendants also filed a motion to defer proceedings on their first petition pending the Fifth Circuit's resolution of appeals relating to the remand of *Alberti I*.[33]

On May 18, 1992, this Court denied State Defendants' first Petition for Writ of Certiorari, as well as their motion to defer consideration of State Defendants' first Petition in *Richards v. Lindsay*, 112 S.Ct. 1994 (1992).[34] Accordingly, this Court found each of State Defendants' arguments to be ripe last year when it denied State Defendants' first Petition for Writ of Certiorari on the merits.

On November 20, 1992, on appeal after remand of *Alberti I*, the Fifth Circuit affirmed the district court's findings of deliberate indifference in a *per curiam* opinion in *Alberti II*.[35] In *Alberti II*, the Fifth Circuit emphasized that the State Defendants knew that their refusal to accept prison-ready felons

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33 *See*, State Defendants' January 17, 1992 "Motion to Defer Proceedings on Petition for Writ of Certiorari Pending Decision in *Alberti v. Sheriff of Harris County v. Richards et al.*, No. 91-2946, 91-6062, 91-6206," which was filed in conjunction with State Defendants' Petition I (S.Ct. No. 91-1202). [County Defendants' Appendix M].

34 *Alberti v. Sheriff of Harris County v. Richards*, 937 F.2d 984 (5th Cir. 1991) *(Alberti I), cert. denied sub nom., Richards v. Lindsay*, ___ U.S. ___, 112 S.Ct. 1994, 18 L.Ed.2d 590 (1992).

35 *See Alberti v. Sheriff of Harris County*, 978 F.2d 893 (5th Cir. 1992) *(Alberti II)* (per curiam) [State Defendants' Appendix II at A].

was causing severe overcrowding in the Harris County jail facilities, but elected to refuse to accept prison-ready felons to solve their own overcrowding problems. Citing its *Alberti I* opinion, the Fifth Circuit rejected State Defendants' complaint that their duty toward prison-ready felons was "uncertain".[36] On the other hand, the Fifth Circuit found that the record "evidence[d] `arguably formidable constraints' facing the county including the dramatic increase in the number of state ready-felons being kept in the county jail, largely beyond the county's control to prevent."[37] Given the County's operation of its jail over constitutional capacity for some time, the Fifth Circuit found that the district court's finding of deliberate indifference as to County Defendants was not clearly erroneous.[38] On January 13, 1993, the Fifth Circuit denied State Defendants' petition for rehearing and suggestion of rehearing en banc of *Alberti II*.[39] On April 12, 1993, State Defendants filed the instant Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

State Defendants request this Court to serve as a "super-appellate" court, reviewing well-settled legal principles and factual findings which have been decided adversely to them. This case should not be reviewed on certiorari because each issue and argument now advanced by State Defendants was rejected by this Court last year in *Richards v. Lindsay*, 112 S.Ct.

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36 *Alberti II*, 978 F.2d at 894-95 [State Defendants' Appendix II at A3-A4].

37 *Alberti II*, 978 F.2d at 895 [State Defendants' Appendix II at A5].

38 *Alberti II*, 978 F.2d at 895-96 [State Defendants' Appendix II at A5-A6].

39 *See* [State Defendants' Appendix II at B].

1994 (1992), because the Fifth Circuit's *Alberti II* opinion affirms factual findings made by the district court and raises no issues of national importance, because there are no conflicting circuit court opinions commanding reconciliation by this Court, and because State Defendants have failed to present their petition for certiorari with accuracy in violation of Rule 14.5.

REASONS FOR DENYING THE WRIT

I.

THIS COURT DENIED CERTIORARI LAST YEAR WHEN PRESENTED WITH EACH OF THE ISSUES AND ARGUMENTS RAISED BY STATE DEFENDANTS IN THE INSTANT PETITION.

State Defendants inappropriately ask this Court to act as a "super-appellate" court in reviewing factual findings of deliberate indifference which were affirmed by the Fifth Circuit in *Alberti II*. Discretionary jurisdiction is "not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."[40]

Each legal issue presented in State Defendants' instant petition was reviewed by this Court last year in conjunction with *Alberti I*, when this Court denied State Defendants' Petition for Writ of Certiorari in *Richards v. Lindsay*, 112 S.Ct. 1994 (1992). The instant petition essentially reproduces each issue and argument found in State Defendants' first Petition for Writ of Certiorari in a blatant attempt to obtain a rehearing of the denial of their first petition. In so doing, State Defendants

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40 *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 190 & n. 8 (6th ed. 1986) ("The Supreme Court is not, and never has been, primarily concerned with correction of errors in lower court decisions.") (citations omitted).

attempt to make an end run around the well established doctrine favoring the finality of litigation.[41]

II.

THE FIFTH CIRCUIT'S *ALBERTI II* OPINION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS DECIDING THESE SAME OR SIMILAR MATTERS.

State Defendants' *Pennhurst* and Eleventh Amendment arguments are neither novel nor substantial, and have been squarely addressed previously by this Court in this and other cases.[42] It is well-settled that federal district courts have broad discretion in imposing injunctive remedial relief with attendant ancillary costs against state officials when vindicating constitutional rights.[43] Upon finding that State Defendants violated Inmate Plaintiffs' Eighth Amendment rights, the district court was not only authorized, but was mandated, to fashion a remedial order to adjudicate the wrong.[44]

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41 *See, e.g.*, S.Ct. R. 51.4 (rule against successive petitions for rehearing).

42 State Defendants' Petition II regurgitates identical *Pennhurst* and Eleventh Amendment claims made last year in their first Petition for Writ of Certiorari. *Compare*, State Defendants' Petition II at i, 15-20; State Defendants' Petition I at i, 13-18.

43 *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974); *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908).

44 In *Ruiz v. Estelle*, the same State Defendants in charge of the Texas prison system argued that they were entitled to Eleventh Amendment immunity from suit. The Fifth Circuit rejected the State's Eleventh Amendment immunity claims, holding that the "Board members are responsible as individuals, in the same manner as the Director of TDC, for any violation of

State Defendants argue, as they did in their first petition, that certiorari should be granted because *Alberti* conflicts with the Sixth Circuit's opinion in *Kelley v. Metropolitan County Board of Education*.[45] No such conflict exists. *Kelley* is patently inapplicable to the factual and legal issues raised in *Alberti*.

In *Kelley*, the Metropolitan County Board of Education sued state officials seeking recovery of costs previously incurred in a school desegregation case where the relief sought by the Plaintiffs--desegregation--had been fully implemented. In *Kelley*, unlike *Alberti*, the Sixth Circuit observed, "[t]he Tennessee officials are not doing anything wrong; they have been joined solely to permit one sometime constitutional wrongdoer to recover monetary compensation from another."[46] In *Alberti*, however, the Inmate Plaintiffs and County Defendants have not sought the imposition of any monetary damages against the State Defendants, nor have such damages been assessed.[47]

In *Kelley*, unlike *Alberti*, the Sixth Circuit found that the record "simply did not show that the State of Tennessee is currently a participant in any constitutional violation."[48] In

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constitutional rights caused by their management." *Ruiz v. Estelle*, 679 F.2d 1115, 1137 (5th Cir.), *modified in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983).

45 *Kelley v. Metropolitan County Board of Education*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988).

46 *Kelley*, 836 F.2d at 990.

47 County Defendants' Appendix at I & J.

48 *Kelley*, 836 F.2d at 995. According to the Sixth Circuit, "[W]e have searched the record of this case in vain for any demonstration that the

Alberti, in contrast, the district court held that State Defendants were *directly* and *currently* causing continuing deprivations of Inmate Plaintiffs' Eighth Amendment rights. State Defendants' *Kelley* argument ignores the fact that the district court found that State Defendants were *present* constitutional violators, who had caused and were continuing to cause the unconstitutionally overcrowded conditions in the Harris County Jail facilities through their refusal to accept prison-ready felons into the state's penitentiary system, ignores the fact that the prison-ready felon population continued to grow, making it virtually impossible for the County Defendants to remedy the overcrowding in these facilities and hence provide constitutional conditions of confinement to all inmates, and ignores the fact that the district court gave State Defendants the choice of either limiting the prison-ready population in the jail facilities or expending the ancillary costs associated with transferring those in excess of their cap to other county detention facilities.[49]

Since State Defendants are "responsible for prison-ready felons," Judge Higginbotham easily distinguished *Pennhurst*, *Bush*, and *Kelley*, observing, in part:

> The state also urges that the orders violate the Eleventh Amendment because they exact monetary rather than prospective relief. Like the *Pennhurst* argument, however, this contention mischaracterizes the orders -- the plaintiffs

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integration of metropolitan Nashville's schools has been wrongfully impeded by anything the state has done, or has failed to do, in the 1970s or 1980s. The mere fact that Tennessee was a constitutional wrongdoer prior to 1956 does not mean that it was still a constitutional wrongdoer when the district court entered its order 30 years later." *Kelley*, 836 F.2d at 993-94.

[49] *See* State Defendants' Appendix II at T & Y; State Defendants' Appendix I at S & X.

> established a federal constitutional violation, and the state is a responsible party. The required payments are thus `a necessary consequence of compliance in the future with a substantive federal question determination.' . . . *Kelley*, cited extensively by the state, is distinguishable--the order remedying the violation in *Kelley* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order.[50]

Indeed, the Fifth Circuit's *Alberti I* and *II* opinions follow three cases "involv[ing] essentially identical situations" as presented in *Alberti*, including the Sixth Circuit's *Tate v. Frey* decision, the Second Circuit's *Benjamin v. Malcolm* decision (wherein certiorari was denied), and the Fifth Circuit's *Stewart v. Winter* decision.[51] There is, therefore, no conflict between the Fifth and Sixth Circuits, or any other circuit.

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50 *Alberti I*, 937 F.2d at 1001-02 & nn. 7-8 (citations omitted) [State Defendants' Appendix II at C-29; State Defendants' Appendix I at A34-A35] (*citing Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358 39 L.Ed.2d 662 (1974); *see also, Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Williams v. Edwards*, 547 F.2d 1206, 1212-13 (5th Cir. 1977); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), *rev'd in part on other grounds*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Kelley*, 836 F.2d at 990-94).

51 *Alberti I*, 937 F.2d at 994-97, 1001 (*citing Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied sub nom, Cuomo v. Koehler*, 480 U.S. 910, 107 S. Ct. 1358, 94 L.Ed.2d 528 (1987); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984) (per curiam)) [State Defendants' Appendix II at C14-C22, C28-c29; State Defendants' Appendix I at A19-A22, A34-A35.

III.

THE FIFTH CIRCUIT'S ABSTENTION AND CERTIFICATION HOLDINGS DO NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

State Defendants' Petition for Writ of Certiorari simply renews the same abstention and certification arguments rejected by the Fifth Circuit in *Alberti I*, and rejected by this Court when denying certiorari on State Defendants' first petition in 1992.

During the Fifth Circuit's consideration of *Alberti I*, State Defendants argued that the district court should have abstained from ordering them to pay for the housing of prison-ready felons transferred to other Texas county jail facilities pending the ultimate resolution of the state litigation.[52] In each case, the state district court found that State Defendants have a clear, mandatory, nondiscretionary duty to take and make provision for prison-ready felons within a reasonable time after they are sentenced to the state penitentiary or to pay for their upkeep in Texas county jail facilities.[53] Thereafter, the parties settled the litigation. Given the resolution of these cases, State Defendants' argument is moot.

Notwithstanding the mootness of State Defendants' argument, State Defendants' abstention and certification

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52 *See Alberti I*, 937 F.2d at 1002 [State Defendants' Appendix II at C30; State Defendants' Appendix I at A35].

53 *See* County Defendants' Appendix at A-H. State Defendants argue that since they settled these cases before a state appellate court reviewed these decisions, the state court pronouncement should be given no weight in the federal proceedings. However, this Court has recognized that trial court interpretations constitute a ruling on a question of state law which is binding on the federal courts. *See City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 2514, 96 L.Ed.2d 398 (1987). Therefore, there was no necessity to abstain until a state appellate court had an opportunity to rule. *Id.*

arguments wrongly attempt to elevate matters of discretion to mandatory requirements. The Fifth Circuit's *Alberti* opinions present no departure from settled principles which grant discretion to the lower courts in deciding whether to postpone or decline jurisdiction under the abstention doctrine.[54] This Court has admonished that abstention should only be used in extraordinary and narrow circumstances where it would clearly serve an important countervailing interest.[55] Abstention is the exception, not the rule.[56] After determining that none of the abstention theories fit the facts of *Alberti*, the Fifth Circuit found that the district court "simply adopted the approach of the only state court to have decided the issue pending a decision by a higher state court."[57]

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54 *Harman v. Forssenius*, 380 U.S. 528, 85 S.Ct. 1177, 1181, 14 L.Ed.2d 50 (1965). "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction ... Thus, 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.' " *Harman*, 85 S.Ct. at 1182 (citations omitted).

55 *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959).

56 *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976).

57 *Alberti I*, 937 F.2d at 1002 [State Defendants' Appendix II at C30; State Defendants' Appendix I at A35-A36]. While an appeal with a supersedeas stays the execution of the judgment, it does not, until and unless reversed, detract from its decisiveness and finality. *See e.g., Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 61 S.Ct. 513, 85 L.Ed. 725 (1941); *Fidelity St. Life Ins. Co. v. First Nat. Bank & Trust*, 510 F.2d 272, 273 (5th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975).

"Federal abstention ... presupposes the availability of an alternative state forum which can afford full and fair relief."[58] Where certain types of relief are not available in state court, or where delay might significantly impair constitutional rights, abstention is inappropriate.[59] State Defendants erroneously characterize this case as simply a dispute between County Defendants and State Defendants.[60] On the contrary, the dispute resolved by the lower courts' orders is between the Inmate Plaintiffs and State Defendants and is based upon federal constitutional law. In the present case, abstention would have vitiated Inmate Plaintiffs' federal constitutional claims against State Defendants. Furthermore, abstention would have prevented an adjudication of State Defendants' liability, leaving County Defendants strictly liable for State Defendants' breach of their federal constitutional duties. To impose a remedy against one defendant without ascertaining the respective liabilities of all defendants would have been contrary to established principles of jurisprudence and would have contravened fundamental concepts of due process, fairness and justice.

State Defendants urge that the district court's injunctive remedial orders "undermined" House Bill 2335's allocation formula by "de facto giving Harris County additional beds above its allocation formula."[61] State Defendants fail to mention, however, that the allocation formula specifically provided for the dedication of additional beds to counties with overcrowded jails.

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58 *Nissan Motor Corp. v. Harding*, 739 F.2d 1005, 1010 (5th Cir. 1984) (*quoting*, *Duncan v. Poythress*, 657 F.2d 691, 696 n. 5 (5th Cir. 1981), *cert. dism'd*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982)).

59 *Nissan Motor Corp.*, 739 F.2d at 1010-11 (citations omitted).

60 *E.g.*, State Defendants' Petition II at 4-5, 15, 20; State Defendants' Petition I at 19-20.

61 State Defendants' Petition II at 24; State Defendants' Petition I at 21.

State Defendants also contend that the orders removed Harris County's financial burden of supporting inmates sentenced to state prison in excess of Harris County's allocation.[62] In *Harris County v. State of Texas*, the state district court not only found that House Bill 2335 and its allocation formula in no way relieved or excused State Defendants' financial liability for prison-ready felons, but also held that State Defendants unconstitutionally used *ad valorem* tax money collected by Harris County.[63] Even assuming *arguendo*, if there were a complex state regulatory scheme for sentencing and housing convicted felons, *Burford* would not require abstention.[64] No doctrine requires abstention merely because resolution of a federal question may result in the overturning of a state policy.[65]

State Defendants argue that, given "the settlement of the state court lawsuits and the accompanying changes in state law," certification may be the most appropriate course now to resolve any remaining dispute about their duties.[66] Certification is not mandated but is discretionary and provides no basis for this Court's review. Furthermore, State Defendants cannot seek certification of their duties under House Bill 93 inasmuch as they failed to do so in the district court or in the Fifth Circuit.

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62 State Defendants' Petition II at 24; State Defendants' Petition I at 21-22.

63 *See, e.g.*, County Respondent's Appendix G at 53a.

64 *New Orleans Public Service v. Council of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 2514, 105 L.Ed.2d 298 (1989) (*citing Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098 (1943)).

65 *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 678 n. 5, 54 L.Ed.2d 618 (1978).

66 State Defendants' Petition II at 25.

Finally, State Defendants cannot now ask for the Texas Supreme Court's determination of issues which would have occurred in the natural course of the state court litigation (but which State Defendants deliberately avoided through settlement of those lawsuits).

IV.
WILSON V. SEITER

This Court should deny State Defendants' application for certiorari on the *Wilson v. Seiter* issue because State Defendants are presenting the same issue upon which this Court denied certiorari last year, because State Defendants essentially ask this Court to serve as a fact-finder and because State Defendants misstate the record and holdings relating to this issue.

State Defendants ask this Court to redecide factual issues which were decided adversely to them in the district court and on appeal in *Alberti II*. This Court is a "court of law . . . rather than a court for correction of errors in fact finding, [and] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."[67]

State Defendants' arguments misrepresent the *Alberti* record and misstate the lower courts' holdings. State Defendants claimed, in their first Petition for Writ of Certiorari, that nothing in the *Alberti* record suggested that they knew about the conditions in the Harris County Jail facilities prior to September, 1989.[68] State Defendants now argue that there was no evidence

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67 *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S.Ct. 535, 538, 93 L.Ed.2d 672 (1949).

68 State Defendants' Petition I at 23-24.

of the culpable mental state required under *Wilson v. Seiter*.[69] These arguments ignore the fact that State Defendants' counsel acknowledged in open court during trial that the conditions of confinement in the Harris County Jail facilities were unconstitutional.[70] Without even attempting a foray into the *Alberti* testimony and exhibits, including testimony from the state's witnesses clearly establishing State Defendants' knowledge of severely overcrowded conditions in the Harris County jail facilities and concomitant refusal to accept prison-ready felons into TDCJ-ID, the *Alberti* pleadings themselves reveal that State Defendants knew about the conditions of confinement faced by the State's prison-ready felons in October, 1988, when the Harris County Sheriff sent letters to State Defendant James Lynaugh which pleaded for removal from the jail of the State's convicted felons, and deliberately instituted policies calculated to backlog prison-ready felons in the Harris County jails.[71] Thus, under *Rhodes v. Chapman*, which "turned on the objective component of an Eighth Amendment claim (was the deprivation sufficiently serious?), [rather] than the subjective component (did the officials act with a sufficiently culpable state of mind?),"[72] State Defendants were liable for violations of the Inmate Plaintiffs' Eighth Amendment rights.

Although State Defendants were admittedly sued in their official rather than individual capacities, they argue that their

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69 State Defendants' Petition II at 26.

70 *See e.g.*, State Defendants' Appendix II at Y17 & Y21.

71 *See e.g.*, County Defendants' Petition I at 20 (including other citations).

72 *Wilson*, 111 S.Ct. at 2324 (*citing*, *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)); *Alberti I*, 937 F.2d at 998.

"duties" were not clearly established.[73] State Defendants misstate the "duties" at issue in *Alberti*, arguing that they had no supervisory responsibility over local jails and no duty to inspect or fix the Harris County Jail facilities.[74] The *Alberti* record clearly shows that State Defendants' liability was not grounded upon any duty to oversee and "police" the conditions in the Harris County Jail facilities. Instead, the lower courts found that State Defendants, who have primary responsibility for confining convicted felons, could not shed their constitutional obligations to those felons by choosing to leave their prison-ready felons in overcrowded county jails.[75]

V.

STATE DEFENDANTS' FAILURE TO ACCURATELY PRESENT THE LOWER COURTS' FACTUAL FINDINGS AND LEGAL HOLDINGS

"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the Petition."[76] County Defendants are constrained to catalog the most blatant

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73 State Defendants' Petition II at 26-27. The Fifth Circuit summarily rejected this argument, finding that the doctrine is applicable only as a defense to the individual liability of persons. *Alberti II*, 978 F.2d at 895 (citation omitted).

74 State Defendants' Petition II at 28 & n. 27.

75 *Alberti II*, 978 F.2d at 895-96; *Alberti I*, 937 F.2d at 994-96, 1001 (*citing*, *Benjamin*, 803 F.2d at 46, 51; *Tate*, 735 F.2d at 986, *Stewart*, 669 F.2d at 332 [State Defendants' Appendix II at C28-C29; State Defendants' Appendix I at A.]; State Defendants' Appendix II at Y28-Y29.

76 *See*, S.Ct. R. 14.5.

misstatements made by State Defendants made in violation of this Court's rules.

State Defendants state that the Texas Legislature, on "three occasions, failed to pass bills to compensate Texas counties for holding convicted felons."[77] They failed to note, however, that these bills never made it to the floor of the Legislature.[78] State Defendants urge that "state law is explicit and abundantly clear that the state prison system has a duty to accept inmates `only' pursuant to former TEX. REV. CIV. STAT. ANN. art. 6166a-4 ..."[79] The statute does not state this proposition, and the state court has ruled that Article 6166a-4, the allocation formula, does not change State Defendants' duties owed to convicted felons.[80]

State Defendants represent that House Bill 2335's "primary purpose was to establish a system of financial incentives and disincentives directed at controlling front-end population pressures by providing state financing for sentencing alternatives *while at the same time forcing local governments to fund the cost of their own transfereligible inmates.*"[81] Neither House Bill 2335, nor its legislative history, supports the highlighted portion of this proposition.[82]

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77 State Defendants' Petition II at 10; State Defendants' Petition I at 6.

78 *Alberti I*, 937 F.2d at 997-98 n. 5; State Defendants' Appendix II at C-22 n. 5; State Defendants' Appendix I at A27.

79 State Defendants' Petition II at 11; State Defendants' Petition I at 7 (emphasis in Petition).

80 County Defendants' Appendix I & II at A-H.

81 State Defendants' Petition II at 11-12; State Defendants' Petition I at 8 (emphasis added).

82 *See* County Defendants' Appendix at A-H.

In support of their arguments, State Defendants cite a Special Master's report which has not been adopted by the district court, and which is not properly part of the record in this Court.[83] State Defendants state that they have built or funded a grand total of 72,849 beds since 1984. These numbers are misleading, including the gross number of beds "funded" (and thus not actually existing even today) and including those beds which were actually taken off-line in accordance with State Defendants' "depopulation agreements" made in *Ruiz*, another case. They fail to acknowledge that they provided a net increase of only three prison beds in the state's penitentiary between 1982 and 1987, and a net increase of only 11,771 prison beds between 1982 and 1991.

Contrary to State Defendants' contentions, neither the legislative history of House Bill 93 nor the settlements of the state cases indicated that the State was liable for prisoner transfers only after October 1, 1991.[84]

State Defendants argue that they should be held to the standard of "malicious or sadistic" intent under *Wilson v. Seiter* because of *Ruiz* "requirements".[85] State Defendants fail to note that capacity requirements were self-imposed by stipulation (and not by any short-term emergency where prison officials were required to act "in haste [and] under pressure"), that they have

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83 State Defendants' Petition II at 12-13 & n. 9; State Defendants' Petition I at 8 & n. 7. State Defendants also cite a transcript of remarks which is not properly before this Court. State Defendants' Petition II at 13 n. 10 & 16 n. 14; State Defendants' Petition I at 14.

84 *Compare*, State Defendants' Petition II at 14-15; State Defendants' Petition I at 10.

85 State Defendants' Petition II at 26-27 n. 26.

disregarded open invitations from the Fifth Circuit to seek modification of their *Ruiz* cap, and that their previous efforts to modify that cap included only one attempt in 1986, a year after they signed their overcrowding stipulation agreement in *Ruiz*.[86] These and other misstatements and inaccuracies require summary denial of State Defendants' Petition.

CONCLUSION

While every case involving the deprivation of constitutional rights is important, State Defendants have failed to establish any special and important reasons for this Court to grant certiorari in their second attempt in as many years to obtain this Court's review of the same issues in this case. County Defendants therefore ask this Court to deny State Defendants' second Petition for Writ of Certiorari. Pursuant to Rules 49 and 50, County Defendants also ask this Court to award them the attorneys' fees and double costs incurred in responding to State Defendants' second Petition for Writ of Certiorari.

Respectfully submitted,

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86 *See, Alberti I*, 937 F.2d at 998 & n. 6; *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987).

Appendix A

APPENDIX A -- FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED NOVEMBER 26, 1990 -- *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
250th JUDICIAL DISTRICT

NO. 452,071

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above captioned cause came on for trial before the Court without a jury in several proceedings. Partial summary judgment was rendered in favor of Plaintiff/Relator and Intervenors (the Counties). Evidentiary hearings were held on October 2-5, 1989 on Defendants/Respondents' impossibility defense; on April 30-May 2, 1990 on what constitutes a

reasonable amount of time after sentencing for the State to take its prisoners or to begin compensating the Counties and what constitutes reasonable compensation per prisoner day when the State does not take the prisoners; and on August 8, 1990 on whether the amount of time and compensation found to be reasonable prior to the adoption of the allocation formula on March 2, 1990 pursuant to House Bill 2335 was reasonable thereafter. All parties were present through their attorneys at all trial proceedings. After considering the pleadings, the evidence, the argument and briefs from counsel, the Court in response to a request from the State makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. This cause was commenced by Nueces County seeking a writ of mandamus to compel the Texas Board of Corrections; the members of the Texas Board of Corrections; and James A. Lynaugh, Executive Director of the Texas Department of Corrections, to take and to make provision for prisoners sentenced to confinement in the State penitentiary ("State prisoners") who were being held in the county jail (or in the jail of another entity under contract).

2. Seeking the same relief as Nueces County, the Counties of Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis and Victoria intervened (these counties together with Nueces County are referred to as "Counties").

3. The Counties demanded that Respondents carry out their duty to take prisoners within a reasonable time after sentencing to confinement in the State penitentiary and the Counties' demands were refused.

Appendix A

4. The Counties continue to hold state prisoners in their jails or in the jails of other entities under contract.

5. During the pendency of these proceedings, the Texas Board of Corrections and the Texas Department of Corrections were replaced by successors.

6. The Texas Board of Criminal Justice is the successor to the Texas Board of Corrections and the Texas Department of Criminal Justice is the successor agency to the Texas Department of Corrections.

7. The State prison system is now operated by the Institutional Division of the Texas Department of Criminal Justice.

8. All the members of the former Board of Corrections were appointed to its successor, the Texas Board of Criminal Justice, and James A. Lynaugh was appointed by the new Board as Executive Director of the successor agency, the Texas Department of Criminal Justice.

9. The members of the Texas Board of Criminal Justice, the Executive Director of the Texas Department of Criminal Justice, and the Director of the Institutional Division of the Texas Department of Criminal Justice along with the respective Board, Department, and Division are Respondents in this action. (Respondents are hereafter jointly referred to as "TDC.")

10. Lack of joinder of all Texas counties and State prisoners in county jails does not impair or impede the ability of such parties to protect their interests.

Appendix A

11. The Crowding Stipulation in *Ruiz v. Lynaugh,* Civil Action No. H-78-987 (S.D. Tex.) (hereinafter *"Ruiz")* represents a settlement agreement entered by the State which, among other things, limits the State penitentiary inmate population.

12. It is not impossible for TDC to carry out its mandatory duty to take State prisoners within a reasonable time after the prisoners are sentenced to serve a term in the State penitentiary.

13. A number of means of carrying out the mandatory duty to make provision for convicted felons are available to TDC including: a) contracting with private vendors, local governmental entities such as counties, or the federal government; b) use of the Prison Management Act, furloughs, and good conduct time to control prison population administratively; c) seeking reasonable modification of the crowding stipulation in Ruiz in good faith; and/or d) use of appropriated funds or seeking additional funds to perform this nondiscretionary obligation.

14. TDC has not compensated the Counties for holding State prisoners that TDC should have taken.

15. A demand by the Counties for payment of compensation from TDC for holding State prisoners would have been futile.

16. TDC was given opportunity to set an amount it deemed to be reasonable compensation to the Counties for carrying out the mandatory duty on which TDC had defaulted.

Appendix A

17. TDC refused to set an amount of reasonable compensation and requested a jury trial on this issue which was granted but was later withdrawn by TDC in favor of a trial before the Court without a jury.

18. TDC was given opportunity to set an amount of time that it considered to be a reasonable amount of time after sentencing for TDC to take its prisoners or to begin compensating the Counties that are providing for the prisoners because of the TDC's default.

19. TDC refused to set an amount of reasonable time and requested a jury trial on this issue which was granted but was later withdrawn by TDC in favor of a trial before the Court without a jury.

20. The reasonable value of the services provided by the Counties in holding State prisoners that TDC should have taken is $40.00 per prisoner per day.

21. An amount-of compensation to the Counties of less than the reasonable value of services provided in holding State prisoners would be an incentive to TDC to continue to impose its mandatory duty by default on the Counties which are unwilling and unauthorized to accept that duty.

22. A reasonable amount of time after sentencing for TDC to either take the State prisoners or begin compensating the Counties who hold the prisoners because of the TDC's default is seven days.

Appendix A

23. TDC's failure and refusal to carry out their duty to take State prisoners caused a backlog of State prisoners in the Counties' jails or in facilities with which the Counties contracted and made it futile for the Counties to timely prepare transfer paperwork and present prisoners to TDC for admission to the State penitentiary.

24. From September 28, 1987 through March 1, 1990, TDC's Scheduled Admissions Policy allocated to the Counties a portion of the total capacity available in TDC's prison facilities.

25. Effective March 2, 1990, the allocation formula adopted by TDC pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990) allocates to the Counties a portion of the total capacity available in TDC's prison facilities.

26. The number of prisoner days for which TDC is required to compensate the Counties for the period from September 28, 1987 through February 28, 1990 is as follows:

Bexar	403,750
Collin	77,318
Dallas	848,740
El Paso	220,367
Galveston	86,038
Hidalgo	63,013
Hunt	20,717

Appendix A

Lubbock	92,198
Nueces	143,266
Tarrant	377,021
Travis	170,987
Victoria	4,621

27. The aggregate amount of compensation owed by TDC to the Counties for the period from September 28, 1987 through February 28, 1990 is as follows:

Bexar	$ 16,150,000
Collin	3,092,720
Dallas	33,949,600
El Paso	8,814,680
Galveston	3,441,520
Hidalgo	2,520,520
Hunt	828,680
Lubbock	3,687,920
Nueces	5,730,640

Appendix A

Tarrant	15,080,840
Travis	6,839,480
Victoria	184,840

28. The number of prisoner days and amounts of compensation listed in these findings do not include any prisoners (a) returned to county jail on bench warrants awaiting further proceedings, (b) awaiting trial in state court on the remainder of multiple charges, (c) placed in county jail pursuant to blue warrants prior to parole revocation proceedings, (d) being held on federal detainers awaiting trial in federal court, and (e) pending appeal of sentences of ten years or less who have not exercised their right to be transferred to the State penitentiary immediately upon sentencing.

29. The $40 per prisoner per day compensation figure and the 7 day period from sentencing for compensation to accrue are reasonable for periods occurring from and after March 2, 1990.

30. The backlog of State prisoners in county jails has had the following effect: a) detrimentally affected the provision of local law enforcement services; b) diluted any deterrent effect that felony convictions might otherwise have on persons on whom prison terms are imposed by state judges and juries because their sentences are not being carried out with reasonable dispatch and certainty; and c) further eroded public confidence in Texas' criminal justice system.

31. The Counties' records regarding the number of State prisoners backlogged and the amount of time such prisoners were held in county jails and summaries of such records were

examined by TDC's expert auditors from Price Waterhouse, and the number of prisoner days contained in these findings is consistent with the calculations made by Price Waterhouse for TDC.

32. A conservative estimate of the cost to TDC if TDC had taken actual physical custody of the State prisoners involved in this action is at least between $37.00 and $47.00 per prisoner per day.

33. The Crowding Stipulation which is the consent agreement in *Ruiz* in which TDC agreed not to exceed capacity limits set out therein has been modified on several occasions pursuant to TDC's good faith requests for modification.

34. TDC's request for modification in *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987), with regard to use of the Fort Wolters substandard facilities was not a reasonable request because of the serious deficiencies in those facilities.

35. TDC has taken a proactive role in requesting additional funds to comply with the agreements and orders in Ruiz v. *Lynaugh*, Civil Action No. H-78-987 (S. D. Tex.).

36. Despite their awareness of the backlog in county jails of State prisoners, TDC has not requested funds to provide for these State prisoners.

37. The federal court orders on which TDC bases its *res judicata*, collateral estoppel, and issue preclusion defenses do not reach the issue of TDC's duty to take State prisoners or to compensate the Counties for holding State prisoners.

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38. A proposed amendment to Title 108, Revised Civil Statutes, adding article 6166a-3 which provided that the Texas Department of Corrections was not required to accept an inmate if such acceptance would cause the Texas Department of Corrections to exceed ninety-five percent of its capacity was rejected by the 71st Legislature.

39. The only documents required under article 42.09 of the Code of Criminal Procedure prepared after judgment and sentencing are the standardized felony judgment form and the statement of facts form which is required only if the standardized felony judgment form has not been modified to include citation to the Penal Code or other provision under which the convicted felon was sentenced to serve a term in the State penitentiary.

40. The standardized felony judgment form, which is used by all of the State district courts for sentencing persons to the State penitentiary, can be completed in five minutes or less.

41. All other documents provided pursuant to article 42.09 of the Code of Criminal Procedure including the offense report, indictment, arrest record, change of venue statement, and criminal history are prepared prior to judgment and sentencing.

42. Even if the paperwork required by article 42.09 of the Code of Criminal Procedure is submitted to TDC prior to prisoners' transfer to the Institutional Division of the Texas Department of Criminal Justice, the paperwork is not reviewed or officially accepted until the prisoners are actually physically accepted by TDC at the Diagnostic Unit of the Institutional Division of the Texas Department of Criminal Justice.

43. Some of the alternatives available to TDC to take and make provisions for State prisoners are politically unpopular.

44. A backlog of State prisoners in county jails, which at sometimes amounted to approximately one-fourth of all convicted felons, was created by TDC's refusal to carry out its mandatory duty.

CONCLUSIONS OF LAW

1. This mandamus action is not precluded or otherwise barred by sovereign immunity.

2. A mandamus action to compel TDC to carry out its mandatory duty is not a suit against the State.

3. Adequate relief can be granted in this case without the joinder of all Texas counties and all State prisoners in county jails.

4. TDC has a clear, mandatory, non-discretionary legal duty to take and make provision for State prisoners in the categories involved in this case within a reasonable time after they are sentenced to confinement in the State penitentiary.

5. The Counties--having established that TDC has a mandatory duty to take and make provision for such prisoners within a reasonable time, that the Counties have demanded that TDC perform its mandatory duty, and that TDC has refused their demands -- have established the necessary elements for the granting of a writ of mandamus.

6. The burden of proof to establish impossibility or any other defense is on TDC.

7. TDC has not established impossibility or any other defense to the issuance of a writ of mandamus.

8. Neither TDC's Scheduled Admissions Policy, the Crowding Stipulation, nor any order issued in Ruiz preempts, modifies or nullifies TDC's State law duty to make provisions for the sentenced felons involved in this case nor prohibits the granting of mandamus.

9. The Counties have no adequate remedy at law other than this mandamus action.

10. TDC has authority to plan for prison population pressures and to carry out its mandatory duty to take and to make provision for convicted felons through various means.

11. Means available to TDC to carry out its mandatory duty to take and to make provision for State prisoners include: a) transferring funds between fiscal years and appropriations for various programs administered, supervised and operated by the Texas Department of Criminal Justice and the Texas Board of Criminal Justice; b) contracting with private vendors, counties, or the federal government to care for prisoners sentenced to the State penitentiary; c) greater or continuous use of the Prison Management Act, furloughs, or good conduct time.

12. The political unpopularity of some of the alternatives available to TDC to carry out their mandatory duty does not make it impossible for TDC to utilize these or other alternatives to perform its duty.

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13. Counties are authorized to act only pursuant to statutory or constitutional provisions directly imposing duties on counties or necessarily implied in order to carry out such constitutionally or statutorily imposed duties.

14. No statutory or constitutional provisions or other law transfers to the Counties TDC's mandatory duty to take and to make provisions for the categories of prisoners involved in this case.

15. TDC has a clear, mandatory, nondiscretionary duty to make provisions for the proper care, treatment, feeding, clothing, and management of the prisoners involved in this case.

16. Inherent in and integral to TDC's duty to accept and to make provisions for the care and management of the prisoners involved in this action is the financial responsibility for the carrying out of TDC's duty.

17. TDC's default in performing its duty to make provisions for the care and management of the prisoners involved in this case does not transfer to the Counties TDC's duty or the financial responsibility for carrying out that duty.

18. TDC has a mandatory duty to compensate the Counties for services provided by the Counties in holding State prisoners that TDC should have taken.

19. Payment of compensation by TDC to the Counties may be mandated by this Court because TDC has failed to take the prisoners or to be financially responsible for them when it has a clear, mandatory, nondiscretionary duty to do so.

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20. A writ of mandamus may issue against TDC to raise revenue to carry out its mandatory duty even though exactly how the revenue is to be raised may be left up to TDC, and even though TDC may have to look at third parties as a source of revenue.

21. TDC must seek and obtain or raise the revenues necessary to carry out its mandatory duty and to compensate the Counties when the Counties are required to hold State prisoners because of TDC's default.

22. An effective judgment and peremptory writ of mandamus in this action require the inclusion of provisions ordering TDC to compensate the Counties when they are holding State prisoners because of TDC's default in carrying out its mandatory duty to make provisions for such prisoners.

23. This action is a mandamus action is not an action for damages sounding in contract or tort.

24. The compensation awarded in this case is incident to this mandamus action and is not an award of damages.

25. *Res judicata*, collateral estoppel, or issue preclusion do not bar this action or constitute a defense to the issuance of a judgment and peremptory writ of mandamus against TDC in this mandamus action.

26. Where, as in the instant case, a demand for performance of a mandatory duty would be futile the usual requirement for a formal demand and refusal may be dispensed with in a mandamus action.

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27. TDC's duty to take and make provisions for the categories of prisoners involved in this action continues after the adoption of an allocation formula pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990).

28. The Counties' failure to prepare and present to TDC the paperwork required to accompany prisoners transferred to the State penitentiary does not relieve TDC of its mandatory duty to make provisions for such prisoners within a reasonable time after their sentencing to terms in the State penitentiary because preparation and presentation of such paperwork would have been futile.

29. The adoption of an allocation formula under Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990) does not shift or transfer TDC's mandatory duty to the Counties.

30. The measure of compensation to be paid to the Counties is the reasonable value of the services the Counties have provided in holding State prisoners that TDC should have taken.

31. The measure of what constitutes a reasonable time for TDC to either take the prisoners or compensate the Counties holding the prisoners because of TDC's default is the amount of time it would reasonably take to perform the task of preparing the transfer paperwork and arranging for the transportation of the prisoners if TDC were accepting the prisoners.

32. The paperwork requirements authorized by article 42.09 of the Code of Criminal Procedure do not alter or nullify TDC's duty to carry out judgments sentencing prisoners to the State penitentiary but rather create procedural and administrative

requirements that are to be met at the time that prisoners are actually physically transported and transferred to the State penitentiary.

33. TDC is not required to compensate the Counties for days that State prisoners are held by the Counties pending parole revocation hearings, trial on other offenses, appeals of sentences of ten years or less when the prisoners have not elected to be transferred to the State penitentiary immediately upon sentencing, or dispositions of matters for which such prisoners are being held at the request of federal law enforcement authorities.

34. TDC's duty to take State prisoners or to compensate the Counties for holding such prisoners continues after March 2, 1990, as well as before that date.

35. TDC is liable for post-judgment interest at the rate of 10% in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1980).

36. TDC is liable for costs of suit.

Signed this 26th day of November, 1990.

s/ Joseph H. Hart
JOSEPH H. HART
Judge Presiding
Travis County, Texas

Appendix B

APPENDIX B – JUDGMENT DATED AUGUST 22, 1990 –
THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS

No. 452,071

IN THE DISTRICT COURT, TRAVIS COUNTY, TEXAS
250TH JUDICIAL DISTRICT

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS: DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

JUDGMENT

The above entitled cause came on for hearing before this Court on October 2 through 5, 1989, and April 30 through May 2, 1990. Relator Nueces County, Texas, and Intervenors, Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis and Victoria Counties, Texas, (the Counties) appeared through their attorneys, and Respondents, Texas Board

of Criminal Justice (successor to the Texas Board of Corrections), Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, Jr., James Eller, Pedro Diaz, Jr., Mamie Proctor, Robert Mann, Allan B. Polunsky, members of the Texas Board of Criminal Justice, James A. Lynaugh, Executive Director of the Texas Department of Criminal Justice, and James A. Collins, Director of the Institutional Division of the Texas Department of Criminal Justice, appeared through their attorney.

On April 18, 1989, and September 9, 1989, this Court granted partial summary judgment finding that Respondents had a mandatory, non-discretionary duty to take custody of prisoners sentenced by a trial court to the custody of Texas Department of Corrections ("TDC") or to its successor agency, the Texas Department of Criminal Justice ("TDCJ").

After presentation of testimony, evidence and argument of counsel at the October 2 through 5, 1989 hearing, the Court found that Respondents had not established legal impossibility or any other defense that would prevent issuance of a writ of mandamus. The Court also found that Respondents must reasonably compensate Relator and Intervenor Counties (the "Counties") for holding such prisoners if Respondents failed to take custody of such prisoners within a reasonable time.

After presentation of testimony, evidence and argument of counsel at the April 30 through May 2, 1990 hearing regarding what constitutes reasonable compensation and a reasonable time to take prisoners, the Court found that Respondents shall compensate Relator and Intervenor Counties for holding prisoners at the rate of Forty Dollars ($40.00) per day for each prisoner sentenced to the custody of the TDC or its successor agency, TDCJ; and further found that the compensation owed by

the Respondents should begin to accrue seven (7) days after the date of the judgment and sentence of the court ordering confinement in the TDC or TDCJ. The evidence regarding the number of days that such prisoners were held in the Counties' jails after sentencing for the period beginning September 28, 1987 up to and including February 28, 1990 was uncontrovered by the parties.

The Court has further found that Respondents' adoption effective March 2, 1990, of an allocation formula under the provisions of Tex. Rev. Civ. Sta. Ann. art. 6166a-4 (Vernon Supp. 1990) does not alter or shift to the Counties the Respondents' duty to take prisoners sentenced to the custody of the TDC or TDCJ, or to compensate the Counties for holding such prisoners.

After presentation of further testimony, evidence and argument of counsel at a hearing on August 8, 1990 concerning the applicability of the Forty Dollar ($40.00) amount and seven (7) day period after March 2, 1990, the effective date of the allocation formula, the Court found that after the adoption of the allocation formula Respondents shall compensate Relator and Intervenor Counties at the rate of Forty Dollars ($40.00) per day for each prisoner sentenced to the custody of the TDC or its successor agency, TDCJ; and further found that the compensation owed by the Respondents for post allocation formula periods should begin to accrue seven (7) days after the date of the judgment; and sentence of the court ordering confinement in the TDC or TDCJ.

ACCORDINGLY, the Court is of the opinion that judgment should be rendered in favor of the Counties and that a

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Writ of Mandamus should be issued to compel Respondents to perform said duty.

IT IS, THEREFORE, ORDERED:

1. That a preemptory Writ of Mandamus issue directing and commanding Respondents, Texas Board of Criminal Justice, Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, James Eller, Mamie Proctor, Robert Mann, Allan B. Polunsky, James A. Lynaugh, and James A. Collins to cause the Texas Department of Criminal Justice to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the TDCJ or to its predecessor, the TDC, or to compensate the Counties at a rate of Forty Dollars ($40.00) per day for each such prisoner held in the Counties' jails (including prisoners held in facilities with which the Counties have contracted) and to raise any revenue necessary to pay such compensation.

2. That Respondents' duty to provide for the care and custody of prisoners sentenced to the TDCJ or to its predecessor, TDC, or to pay compensation to the Counties for holding such prisoners, shall begin seven (7) calendar days after issuance of judgment sentencing and committing such prisoners to the TDCJ, or to its predecessor, the TDC.

3. That Respondents shall pay to the Counties the following amounts as the aggregate amount of compensation due to each County for all periods beginning September 28, 1987 up to and including February 28, 1990, for holding prisoners that were Respondents' responsibility under this Judgment:

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Nueces	$ 5,730,640
Bexar	$16,150,000
Collin	$ 3,092,720
Dallas	$33,949,600
El Paso	$ 8,814,680
Galveston	$ 3,441,520
Hidalgo	$ 2,520,520
Hunt	$ 828,680
Lubbock	$ 3,687,920
Tarrant	$ 15,080,840
Travis	$ 6,839,480
Victoria	$ 184,840

4. That Respondents shall pay to the Counties compensation in accordance with this Judgment for prisoners held by the Counties on or after March 1, 1990, that are the responsibility of Respondents. In computing the prisoner days for which compensation is owed from Respondents to the Counties, the Counties shall exclude days during which prisoners have elected, to the extent permitted by law, to remain in county jail; and days that

prisoners are confined in county jail awaiting resolution of other judicial proceedings (e.g., persons on bench warrants or who are subject to detainer) prior to transfer to the TDCJ or its predecessor, the TDC.

5. That the Counties shall submit invoices to Respondents for payment of compensation for prisoners held by the Counties on or after March 1, 1990 (including prisoners held in facilities with which the Counties have contracted), for which Respondents are responsible under this Judgment, to ether with copies of the judgments of commitment to the TDCJ or to its predecessor, the TDC, that correspond to the prisoners covered by the invoices.

6. That the Counties' invoices for compensation for the period from and after March 1, 1990 to the date of entry of this Judgment, shall be presented to Respondents by each County by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which this Judgment is entered. Thereafter, the Counties' invoices for compensation shall be presented by each County to Respondents by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which compensation to the County accrues under this Judgment.

7. That the Judgment hereby rendered shall bear interest in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of ten percent (10%) from the date of judgment until paid.

8. That costs of suit be taxed against Respondents.

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IT IS FURTHER ORDERED that Respondents shall not by this Judgment be relieved of carrying out their obligations under any other relevant order issued by a court of competent jurisdiction, including the agreed orders Respondents have entered into in *Ruiz v. Lynaugh*, No. 78-087-CA; provided, however, that Respondents shall not be precluded from seeking modifications to such orders.

This Judgment should not be considered to contain findings of facts or conclusions of law.

SIGNED this 22nd Day of August, 1990

s/ Joseph H. Hart
JOSEPH H. HART, Judge
126th Judicial District Court
Travis County, Texas

APPROVED AS TO FORM:
HONORABLE JIM MATTOX
ATTORNEY GENERAL OF TEXAS

By:
MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division
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Appendix C

APPENDIX C – PEREMPTORY WRIT OF MANDAMUS DATED AUGUST 22, 1990 – *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

NO. 452,071

IN THE DISTRICT COURT, TRAVIS COUNTY, TEXAS
250TH JUDICIAL DISTRICT

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

PEREMPTORY WRIT OF MANDAMUS

On April 18, 1989 and September 9, 1989 this Court granted partial summary judgment in the above numbered and styled cause finding the Respondents, Texas Board of Criminal Justice, Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, Jr., James Eller, Pedro Diaz, Jr., Mamie Proctor, Robert Mann, Allan B. Polunsky, James A. Lynaugh, and James A. Collins have a mandatory, nondiscretionary duty to take

custody of inmates sentenced by a trial court to the custody of Texas Department of Corrections or its successor agency Texas Department of Criminal Justice.

On October 2-5, 1989 and April 30-May 2 and August 8, 1990, in hearings in the above-numbered and styled cause this Court further found that Respondents had not established legal impossibility or any of the defenses that would preclude issuance of a writ of mandamus and that Respondents have a duty to reimburse the Relator Nueces County, Texas and Intervenors Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis, and Victoria Counties, Texas ("Counties") by paying them reasonable compensation in the amount of $40 per day for the care, treatment, feeding, clothing and management of the inmates that the State should have taken.

The compensation should begin to accrue seven days after the date of the judgment and sentence of the court ordering confinement in the Texas Department of Corrections, or the successor agency, the Texas Department of Criminal Justice.

Respondents have a duty to take all actions necessary to obtain funds required to pay such amounts of compensation.

The Counties have demanded that Respondents perform their duty to take inmates and Respondents have unjustly refused and still refuse to take or make provisions for the inmates.

Respondents show by their acts of refusal to perform the ministerial duty to take the inmates that it is futile for the Counties to issue formal demands for compensation and this Court dispenses with the need for a formal demand and refusal.

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The Respondents' failure to fulfill their duty as outlined above has resulted in manifest injury to the Counties.

Therefore, this Court commands Respondents to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the Texas Department of Crimina' Justice or its predecessor the Texas Department of Corrections, or to compensate the Counties at the rate of $40 per day for each such prisoner held in the Counties' jails (including prisoners held in facilities with which the Counties have contracted) after seven days from the date of judgment and sentence.

This Court further commands Respondents to pay to the Counties the aggregate amount of compensation at the rate of $40.00 per day which has accrued for all periods up to and including February 28, 1990, for holding prisoners (including prisoners held in facilities with which the Counties have contracted) that Respondents failed to provide for under Respondents' duty to provide for the care and custody of all persons sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections and to continue paying amounts that become due until such time as Respondents carry out their duty as outlined above. The aggregate amounts due each County are:

Nueces	$ 5,730,640
Bexar	$ 16,150,000
Collin	$ 3,092,720
Dallas	$33,949,600

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El Paso	$ 8,814,680
Galveston	$ 3,441,520
Hidalgo	$ 2,520,520
Hunt	$ 828,680
Lubbock	$ 3,687,920
Tarrant	$ 15,080,840
Travis	$ 6,839,480
Victoria	$ 184,840

Further, this Court commands Respondents to take all action necessary to obtain funds to pay reasonable compensation.

You are hereby further commanded to make return to this writ before this Court on November 26, 1990 at the Travis County Courthouse, stating how you have executed or what you have done in compliance to this writ and have you then and there this writ.

Signed this 22nd day of August, 1990.

s/ Joseph H. Hart
Joseph H. Hart, Judge
126th Judicial District Court
Travis County, Texas

Appendix D

APPENDIX D – LETTER DECISION DATED MAY 31, 1990 -- *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
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May 31, 1990

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Appendix D

Mr. Robert Ozer
Assistant Attorney General
Chief, Class Action Section
Mr. John Worley
Assistant Attorney General
Enforcement Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Re: Cause No. 452,071; The County of Nueces, Texas vs. Texas Board of Corrections, et al.

Dear Counsel:

In the letter decision of November 21, 1989 I held that the counties had proven all elements necessary for the issuance of a writ of mandamus to take prisoners committed to TDC and that the State failed to prove the defense of impossibility. I held that a mandamus would also issue requiring TDC to reimburse the counties the reasonable amounts for the care, treatment, feeding, clothing and management of the inmates that the State should have taken and to raise the revenues required to pay such amounts. In that letter I did not reach the question of the effect of the allocation formula (37 T.A.C. 152.3) on TDC's duty to take the prisoners or reimburse the counties. At that time the statutorily required allocation formula had not yet taken effect, and TDC was refusing to take prisoners on the basis of its own admissions policy. On March 2, 1990, the formula became effective, and the question is now ripe for decision.

The question remaining in the November 21, 1989 letter was whether prisoners which were not taken by the state because of the formula could be considered as "committed to the county

jails by lawful authority" [Local Gov't Code Ann. 351.041(a) (Vernon 1988)]. If so, then arguably the counties would be liable for the expenses of care of the prisoners. Tex. Crim. Proc. Code Ann. art. 104.002(a) (Vernon Supp. 1989); *See* Tex. Att'y Gen. Op. Nos. JM-615, JM-730 and JM-743. I hold that article 6166a-4 [Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990)] and the allocation formula cannot be read to require the counties to pay for the prisoners which have been committed to TDC by lawful court order but which the state has refused to take by default.

I have outlined below generally the reasons for my decision. Again, this letter should not be considered findings of fact or conclusions of law nor is it intended to preclude other findings or conclusions not expressed in the letter.

The statutes by which prisoners are sentenced to TDC are clear and unambiguous. They clearly provide that individuals convicted of felonies "shall be punished by confinement" in TDC and that TDC shall transport the prisoners to the state penitentiary. Tex. Penal Code Ann. 12.31-12.34 (Vernon 1988); Tex. Crim. Proc. Code Ann. art. 42.09 (Vernon 1988); Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon Supp. 1989).

On the other hand, article 6166a-4, on which the state relies, is ambiguous at best. Insofar as the responsibility for housing felons is concerned, it calls for the development of a formula which "allocates. . .to each county. . . the number of institutional division admissions allocated to the county....until sufficient capacity is available." It neither expressly relieves the state of the duty to take and confine felons nor expressly places that duty on the counties. Only by inference can such an interpretation be reached. If article 6166a-4 is interpreted as

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TDC requests, however, this ambiguous statute will have the following effects:

1. H.B. 2335 which places the "primary responsibility" for the confinement, supervision and rehabilitation of felons on the Texas Department of Criminal Justice will be rendered meaningless. Act of June 15, 1989, Ch. 785, art. 1, 1.02, 1989 Tex. Sess. Law Serv. 3471 (Vernon) (H.B. 2335).

2. The statutes cited above which unambiguously require that TDC confine felons will, in effect, be repealed

3. The portions of the court orders which sentence felons to TDC will be meaningless.

4. New duties will be placed on the counties which they have never had before, possibly in violation of article 5, 18(b) of the Texas Constitution. Conversely, the State will be relieved of duties clearly placed on it by statute.

5. The taxpayers of the affected counties will have to shoulder a tremendous financial burden which under the unambiguous statutes should be borne by the whole state. Governor Clements has stated:

> It is totally wrong to house state prisoners in county jails.
>
> Convicted felons should serve their sentences behind prison walls--*not in crowded county jails at local taxpayer expense.*

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Clements, *Message from the Governor, 1* Texas Criminal Justice Intelligence, No. 3 (June/July 1988). (Emphasis added)

Even according to the state's figures based on incremental costs, the amount exceeds $36,000,000. The counties' figures are several times higher.

Had the legislature wished to have such a profound effect on the criminal justice system and the taxpayers of the affected counties, it could have done so with clear, unambiguous language. For example, one part of H.B. 2335 explicitly allows "a period of detention in a county jail" for convicted felons. Tex. Crim. Proc. Code Ann. art. 42.12, 12 (Vernon Supp. 1990).

Furthermore, as mentioned in the letter decision of November 21, 1989, an attempt was made to enact a statute to do exactly what the state requests that I do in this case, that is, relieve it from financial responsibility. A proposed amendment to article 6166a-3 would have stated specifically that TDC was "not required to accept an inmate for confinement if accepting will cause the department to exceed 95 o of its capacity. . . ". The legislature failed to pass the proposed amendment; I will not by judicial construction perform an act which the legislature itself rejected.

The defendant is asking that I manufacture from the ambiguously worded article 6166a4 precisely what the legislature failed to enact. The statutes clearly placing the responsibility on the state are in effect and should not be repealed by such a vague and ambiguous statute. *Meek v. Wheeler,* 125 S.W. 2d 331 (Tex. Civ. App.--Amarillo 1930) aff'd 144 S.W. 2d 885 (Tex.

Comm'n App. 1940, opinion adopted). The repeal of clear, long standing statutes should not arise by implication. Sutherland, *Statutory Construction,* 23.10 (4th Ed. 1984).

I hold, therefore, that article 6166a4 does not relieve the state of its duty to take the prisoners or shift the responsibility to the counties. The addition of the allocation formula does nothing more than control the administrative process of allocating available space to the institutional division. The duty of the state to take felons sentenced to the custody of the state or reimburse the counties continues after March 2, 1990.

Thank you.

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

Appendix E

APPENDIX E – LETTER DECISION DATED NOVEMBER 21, 1989 -- *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
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November 21, 1989

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Appendix E

Mr. Robert Ozer
Assistant Attorney General
Chief, Class Action Section
Mr. John Worley
Assistant Attorney General
Enforcement Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Re: Cause No. 452,071; The County Nueces, Texasvs. Texas Board of Corrections, et al.

Dear Counsel:

Based on the evidence, authorities and briefs submitted and arguments of counsel, I have reached a decision in this case. I have outlined below in general the bases for my decision. This letter should not be considered formal facts or conclusions of law, nor is it intended to preclude other findings or conclusions which may support the decision.

Question Presented

The ultimate question involved in this case is whether or not a mandamus should issue either to compel TDC to take convicted felons being housed by the counties or to pay for the costs of care and maintenance of such felons, or both.[1]

---

1. "TDC" will be used to refer to the respondents Texas Board of Corrections, its members, the Department of Corrections and its director, although the names have now been changed to the Texas Board of Criminal Justice and Texas Department of Criminal Justice. Nueces County and the intervening counties will be referred to as "Counties."

Appendix E

Elements

Before a mandamus may issue, there must be a mandatory, non-discretionary legal duty on the part of TDC to take the inmates, the Counties must have demanded that TDC perform such duty, and TDC must have refused to perform. *Stoner v. Massey*, 586 S.W. 2d 483, 486 (Tex. 1979). By a summary judgment I have already ruled that TDC has a mandatory, non-discretionary duty to take the inmates:

1. The Penal Code states that individuals convicted of felonies "shall be punished *by confinement in the Texas Department of Corrections*" for various periods. Tex. Penal Code Ann. 12.31-12.34 (Vernon 1988) (Emphasis added).

2. Under the Code of Criminal Procedure a convicted felon *must* be transferred to TDC, under certain ascertainable conditions, when his sentence is pronounced. Tex. Crim. Proc. Code Ann. art. 42.09 (Vernon 1988); *Ex Parte Rodriguez*, 597 S.W. 2d 771 (Tex. Crim. App. 1980).

3. Article 6166r states that the "director [of TDC] *shall* make suitable provisions . . . for the safe transportation of prisoners from counties where sentenced *to the State penitentiary*. ... " Tex. Rev. Civ Stat. Ann. art 6166r (Vernon Supp. 1989). (Emphasis added).

4. Under H.B. 2335 the "department is the state agency with *primary responsibility for: (1)* the *confinement*, supervision and rehabilitation of felons." Act of June 15, 1989, ch. 785, art. 1, 1.02, 1989 Tex. Sess. Law Serv. 3471 (Vernon) (H.B. 2335). (Emphasis added).

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I have also ruled that the Counties have demanded that TDC perform its duty to take the inmates and that TDC has refused to do so. Therefore, under *Stoner* the Counties have satisfied the elements for the granting of a mandamus.

Mootness

TDC has suggested that due to the passage of H.B. 2335 this case has been rendered moot. I have previously overruled this suggestion. The primary changes resulting from H.B. 2335 were the removal of the word "speedy" as a modifier of "transportation" from art. 6166r and the requirement that a formula should be developed in the future for allocating admissions from the counties to the TDC until a sufficient capacity is available.

The removal of the word "speedy" results only in the implication of a "reasonable" time in which to perform the transportation. Sutherland, *Statutory Construction*, 55.03 (4th Ed. 1984). The allocation formula, under H.B. 2335 is yet to be devised or implemented; its impact on TDC's responsibilities after it does take effect is not ripe for decision. The question of TDC's past and current duties prior to the implementation of the allocation formula is before me and is not moot.[2]

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2. No other provision shifts to the counties, or relieves the state from the obligation to confine TDC ready prisoners. Had the legislature wanted to relieve TDC of its duty to accept the inmates, it could have done so. A proposed amendment to art. 6166a-3 "relating to duty of the state to house felons" stated that the "Texas Department of Corrections is not required to accept an inmate for confinement in the department if accepting will cause the

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Impossibility

The remaining question, and that addressed in the hearing beginning October 2, 1989, was whether the taking of prisoners by TDC that were ready for transfer from the counties is impossible. This was an affirmative defense expressly raised by TDC, and if proven, a mandamus could not issue. *Manion v. Lockhart*, 131 Tex. 175, 114 S.W. 2d 216, 219 (1938).

1. Burden of Proof

In my letter decision of March 21, 1989, I implied that the burden of proving impossibility would be on TDC. TDC proceeded at the trial on the question as though it did have the burden. TDC has now cited *King v. Guerra*, 1 S.W. 2d 373 (Tex. Civ. App. –San Antonio 1927, writ ref'd), for the proposition that the party seeking a mandamus has the burden to negative every fact that would have authorized defendant to refuse to take action. I do not believe that *King*, if it is still the law, applies to this case. *King* involved the denial by the Board of Commissioners of San Antonio of an application for the issuance of a permit authorizing the relator to construct and

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department to exceed 95% of its capacity ...." That amendment was deleted. If the intent of the legislature was to relieve the state of its duty to take, such intent was not expressed in any enacted legislation and must be inferred. There is a presumption against the repeal of prior laws by implication, and this rule is especially applicable to laws, such as those in question, which are important public statutes of long standing. If legislators are to make such fundamental changes in the obligation of the department as suggested by TDC, they should designate the provision to be changed, ratheer than leaving the repeal to arise by implication. Sutherland, at § 23.10.

operate an undertaking establishment. In reaching its decision, the board had to weigh various factors involving the public health and welfare. The only question involved was "the validity of the *discretionary* act." *Id.* at 377 (Emphasis added). The essence of the ruling on burden of proof was that the board did not have the burden of proving the existence of the various factors it considered in denying the application. The matters in question were not actually affirmative defenses. Here, on- the other hand, there is no discretion involved in determining the duty to take the prisioners. Prisoners have been convicted of crimes which require TDC to take charge of them. The affirmative defense has been raised that it is impossible to take them.

The law on this point is, I believe, more accurately set out in the following authorities:

55 C.J.S. "Mandamus" 325 (1948):

"The burden of proof is on respondent to prove matters set up in defense...."

53 Am. Jur. 2d "Mandamus" 466 (1970):

"Where, however, the right and the duty appear, the burden of proving matter set up by way of excuse for failure to act, or of justifying such failure to act, rests upon the respondent or defendant. And if the petitioner makes out a prima facie case for the issuance of the writ, the burden of refuting it is on the respondent."

One author on the subject has summarized the law as follows:

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"The conduct of the trial in mandamus differs in no respect from the trial of any civil action, the burden of proof being governed by the general rule that the party holding the affirmative of the issue must establish his allegations by a preponderance of the evidence. The burden of establishing a clear legal right to the relief sought is therefore primarily on relator. [M]atter in avoidance alleged in the return, if denied by relator, must be proved by respondent.

"Following the general rule, affirmative averments in the answer, as fraud, are upon respondent to prove." Ferris, *The Law of Extraordinary Legal Remedies*, 304-306 (1926).

Texas cases more in point than *King* have followed the position in the authorities set out above. In *City of Beaumont v. Stephenson*, 107 S.W. 2d 915, 917 (Tex. Civ. App.--Beaumont 1937, writ dism'd) a mandamus was sought against the city to require it to pay a draft. The city alleged that relator did not show that the city had available funds sufficient to pay the draft. The Court held that "this point was one of defense to be pleaded and supported by proof by [respondents]."

In *Simpson v. Williams Rural High School District*, 153 S.W. 2d 852, 855 (Tex. Civ. App.--Amarillo 1941, writ ref'd) a mandamus was sought to order the school board to sign and affix the corporate seal of the school district to bonds to allow payment on interest coupons. The obligation represented by the interest coupons was valid. Respondent sought to defeat the mandamus based on fraud and false representations. The Court placed the burden of proof of affirmative defenses on respondent:

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> In order for the appellees to defeat appellant's suit because of false representations, it was necessary for them to show that the appellant or his agent made representations which were false, were as to material facts, were made with the intent and design to induce appellees to refund the interest coupons and that such representations were relied upon by them. The testimony wholely fails to establish the elements constituting fraud based on false representations.

Like the fraud in *Simpson*, impossibility is also an affirmative defense for which I hold respondent has the burden of proof.

2. Proof of impossibility

The question remaining is whether or not respondent has met its burden and proven impossibility. I hold that it has not.

I have already held that the *Crowding Stipulation* in Ruiz *v. Lynaugh, Civil* Action No. H-78-987 (S.D. Tex.), which requires a 95°% population cap in TDC does not in itself make compliance with a writ of mandamus an impossibility. Other than a modification of the *Crowding Stipulation*, there are various measures that could be taken by TDC to take the prisioners from the counties. I do not believe that a preponderance of the evidence indicates that these other measures cannot be used. While each alone may not allow TDC to take all the prisioners from the counties, that does not mean that in combination all or part of the prisoners could not be removed from the county jails. Such other methods include

contracting with private vendors, the federal government, and local governments and greater use of the Prison Management Act, [Tex. Rev. Civ. Stat. Ann. art 6184o (Vernon Supp. 1984)], furloughs, and good time.

Some of the measures would be costly; some are perceived to be politically unpopular. These factors, however, do not make the carrying out of TDC's mandatory duty impossible. Funds appear to be available within the existing appropriation bill, pursuant to several riders, including riders 8, 45, 56 and 57. Further, statutory authority exists for contracting with counties and private vendors and with the federal government. Texas Gov't. Code Ann. §§ 494.001, 494.021 and § 494.022. (Vernon Supp. 1989).

TDC has argued that the counties could make greater use of diversionary programs called for in H.B. 2335. However, the possible use of the diversionary programs at the local level does not relieve TDC of any duty to take the prisioners nor does it create an impossibility.

I find, therefore, that TDC has not met its burden of showing impossibility.

Mandamus to Take

All elements for the issuance of a mandamus having been proven by the counties, and TDC having failed to prove by a preponderance of the evidence that it would be impossible to take the prisoners, the mandamus will issue requiring TDC to take the state ready prisoners within a reasonable time. As I have held previously, while there may be some limited flexibility as to

when prisoners are to be accepted, I hold that Texas statutes do not vest discretion in TDC to delay accepting state-ready inmates on the basis of relative overcrowding at state and local facilities. *Ayres v. Coughlin*, 72 N.Y. 2d 346, 530 N.E. 2d 373, 533 N.Y.S. 2d 849 (1988). That is, the fact of overcrowding will not be considered relevant to the question of what is a reasonable time to receive prisoners.

Mandamus to Reimburse or Pay

The Counties have also sought a mandamus for TDC to pay or reimburse them for the costs of housing prisoners that are TDC ready. As held above, TDC does have an obligation to take the prisioners. Therefore, normally the prisoners would be transported to and confined in TDC. Tex. Penal Code Ann. 12.31-12.34; Texas Crim. Proc. Code Ann. art. 42.09; art. 6166r.

Had TDC met its statutory obligations and confined the felons in TDC, then the financial burden would clearly be on TDC. Article 6166g provides that the Texas Board of Corrections and the director:

> shall be responsible for... the proper care, treatment, feeding, clothing and management of the prisoners confined therein.

Tex. Rev. Civ. Stat. Ann. art. 6166g (Vernon 1970).

Questions have previously arisen as to whether or not prisoners who are in the legal, but not physical custody of TDC, similar to the situation in this case, could be considered "confined therein" within the meaning of article 6166g. Attorney

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General opinions have discussed the comparative responsibility between counties and TDC in such situations, for example, for medical costs where a TDC prisoner was in a county jail awaiting hearing on a violation of parole conditions [Tex. Att'y Gen. Op. No. JM-743(1987)] or in the county jail from TDC on a bench warrant [Tex. Att'y Gen. Op. No. JM-730 (1987)]. The Attorney General considered article 6166g along with article 104.002(a) [Tex. Crim. Proc. Code Ann. art. 104.002(a) (Vernon 1988)] which states that a county is liable for expenses incurred in the safe keeping of prisoners confined in the county jail. He concluded that "confined therein" meant the physical presence of the prisoner in TDC was necessary before TDC, rather than the counties, would be liable for the prisoners' expenses.[3]

However, Opinion Nos. JM-730 and JM-743 must be construed in light of art. 5116 (Vernon 1987) [now Tex. Local Gov't Code Ann. § 351.041(a) (Vernon 1988)], as was done in Att'y Gen. Op. No. JM-615 (1987). Article 5116 states that the sheriff shall safely keep in jail "all prisoners committed thereto *by lawful authority,* subject to the order of the proper court. . . " (Emphasis added). In other words, as long as TDC prisoners are committed to a county jail *under lawful authority,* the county is responsible for their care, even though they may be in the legal

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3. Article 6166g has been changed and is now art. 492.001(a) of the Government Code. The phrase "prisoners confined therein" has been dropped and replaced by "inmates." A question could arise, therefore, as to whether it is still necessary that prisoners be physically confined in TDC for TDC to be responsible for their care. I will interpret the phrase "prisoners confined therein" to be synonymous with the word "inmates" for purposes of this decision.

custody of TDC. In the situations described in Opinion Nos. JM-615, JM-730 and JM-743, TDC prisoners were required to be in the county jails by law (thereby complying with art. 5116); therefore, the counties were liable for expenses for care of the prisoners under art. 104.002 of the Code of Criminal Procedure.

Here, however, the situation is completely different. The prisoners have been committed to the custody of TDC by the trial courts. They are in the county jails not under lawful authority, such as under a bench warrant or for a parole violation hearing, but by default. The admissions policy used by TDC violates its statutory duty to take prisoners and, therefore, can not be considered lawful authority. The question is, therefore, as follows: Can TDC merely by defaulting on its obligations and by refusing to take the prisoners (so that they are not physically "confined therein") shift the burden and cost of housing and caring for the TDC-ready prisoners to the taxpayers of the counties where those prisoners are being housed (although not "under lawful authority")?

I hold that it cannot and that responsibility for the proper care, treatment, feeding, clothing and management of the TDC-ready prisoners is on the state, not the Counties.[4]

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4. Under art. 5115.1, § 11 (Vernon 1987) [Now Tex. Gov't. Code Ann. § 511.012 (Vernon 1989)] and Attorney General Opinion MW-398 (1981) the Commission on Jail Standards can require a county to accept prisoners from another county's jail that does not comply with minimum jail standards. The statute requires that the county of the non-complying jail bear the costs of transportation and maintenance of the prisoners. It is interesting that the state is willing to require non complying counties to reimburse other counties who cover for their deficiencies while the state is not itself willing to

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Where a county incurs costs as a result of performing the public obligation of another public entity, the other entity may, be required to reimburse the performing county. *Orange County v. Cow Bayou Canal Co.*, 143 S.W. 963 (Tex. Civ. App.--Galveston 1912, no writ). The primary responsibility for confinement of felons is expressly placed on TDC. H.B. 2335, art. 1, § 1.02(a). Where a governmental body refuses to appropriate or pay when it has the clear, statutory duty to do so, payment may be mandated by the district court. *Vondy v. Commissioners of Uvalde County*, 620 S.W. 2d 104 (Tex. 1981) (mandamus against County Commissioners to set a reasonable salary for the constable).[5] Where an amount is owed that is not fixed, the county still may be mandamused to calculate a reasonable amount, even if it may require an additional decision by the respondent as to what is reasonable. *Id.* at 109.

Where the funds to pay may not be available, a mandamus may issue against a governmental authority to "raise revenue" even though exactly how the revenue is to be raised may be left up to the authority and even though the authority may have to look to third parties as a source for the revenue. *Hawthorne v.*

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do the same when counties cover for the *state's own non-compliance* with federal standards.

5. Another basis for the holding in *Vondy* was the inherent power of the court to protect and preserve the proper administration of the judicial system. This ground is arguably present here, as judicially ordered sentences could not be carried out without means to incarcerate as required by law, i.e. without confinement in TDC. I do not base my decision on the inherent power of the judiciary, however.

La-Man Constructors, Inc., 672 S.W. 2d 255 (Tex. App.--Beaumont 1984, no writ). In addition, a mandamus may issue to pay an amount owed if and when funds are lawfully available or when the voters approve an appropriate tax levy. *Coulson v. Harris County MUD No. 29*, 678 S.W. 2d 726 (Tex. App.--Houston [14 Dist] 1984, writ ref'd n.r.e.). Courts may dispense with a formal demand for payment and refusal where the respondent shows, as it does here, that such a demand would be futile, *see, e.g., City of Austin v. Cahill, 99* Tex. 172, 88 S.W. 542, 545 (1905) or where the respondent has neglected and refused to perform its ministerial duty, as TDC has done in refusing to take the prisoners. *Lake L. B. J. MUD v. Coulson*, 771 S.W. 2d 145, 156 (Tex. App.--Austin 1988), *aff'd in part and rev'd in part on other grounds*, 32 Tex. Sup. Ct. J. 442, 447 (June 10, 1989) (The Supreme Court affirmed the holding of the Court of Appeals that the Texas Water Code does not authorize the issuance of a mandamus to collect a judgment debt created by the same judgment.)

An interpretation of article 6166g [now Government Code § 492.001(a)] that the TDC could refuse to be financially responsible whenever it wished and for whatever reason so long as the inmates were not physically confined in TDC would render § 492.001(a) and TDC's duty to care for inmates meaningless. *Cf. Vondy*, 620 S.W. 2d at 109.

Therefore, I hold, that a mandamus will issue requiring TDC to pay the reasonable costs that the Counties have incurred in the care, treatment, feeding, clothing and management of the inmates, and to raise the revenue to pay such costs.

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I do not decide at this point what amount should be paid *(Vondy)* or from what sources such funds should come *(Hawthorne)*. The determination of the amount of the reasonable costs will initially be left to TDC. I urge TDC and the Counties to confer together to resolve this issue. The source of the funds, is a decision to be made by TDC.

A holding that TDC is financially responsible does not mean that it is relieved of the statutory duty to house TDC-ready prisoners. It means only that if by default TDC refuses to do so and the counties shoulder the responsibility where TDC has failed, then the counties must be reimbursed.

Conclusion

I would like to conclude this letter decision with a passage from a recent opinion by Justice Keltner in *Tarrant County Commissioner's Court, et al. v. Markham*, No. 2-89-097-CV (Tex. App.--Ft. Worth, September 28, 1989, n.w.h.) (not yet reported). While the opinion deals with Tarrant County jail overcrowding, the following passage is otherwise completely applicable to this case:

> All the parties admit that [the counties' jails] are over-crowded. Much of this blame is due to the failure of the State of Texas to meet its obligations to house inmates who have been committed to the Texas Department of Corrections (T.D.C.) by the order of state courts. *See* Tex. Code Crim. Proc. Ann. art. 42.09 (Vernon Supp. 1989).

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The sad truth is that the State of Texas fails to meet its obligations to incarcerate convicted felons because of the state's settlement agreement in the well-known *Ruiz v. Estelle, 679* F.2d 1115 (5th Cir. 1982). By its settlement, the State of Texas made several agreements regarding the incarceration of inmates, including an agreement to limit the inmate population incarcerated in T.D.C. In order to meet its obligations under the *Ruiz* settlement, the state has adopted a policy of refusing to accept inmates from county jails, committed to T.D.C., as is the state's obligation under law.

The unhappy result is that there are two prison systems in Texas. One is operated "on the books" by T.D.C. and appears to meet the state's obligations under *Ruiz*. This prison system is financed by the State of Texas out of the state budget. The second Texas prison system is less visible to the public eye; but it exists in increasingly overcrowded county jails. In this system, inmates who have been committed to T.D.C. by state courts, are forced to languish in jails of the various counties throughout the state, because of the state's failure to accept the inmates committed to T.D.C. As a result, this second system is not financed out of the state's budget. Instead, these inmates committed to the T.D.C. are incarcerated at the cost of the various counties throughout Texas.

The costs of these efforts are being borne by . . . County taxpayers for a function which is properly that of the State of Texas.

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This holding is not (as suggested by TDC) an attempt by the court to substitute its own plan for dealing with prison overcrowding for the plan of the Legislature adopted in H.B. 2335.

It is purely a determination that under the statutes as they now exist TDC has not been relieved of its responsibility to take felons committed to its custody. If the Legislature wishes to relieve TDC of that responsiblity, perhaps it may do so, but it must do so expressly. Until that time, TDC must comply with its obligation to take the prisoners or reimburse counties for housing and caring for them on its behalf.

This decision does not reach the question of the effect of the allocation formula on TDC's duty to take the prisoners or reimburse the Counties. The allocation formula required under art. 6166a4 has not yet taken effect; therefore, the question is not before me. Will TDC's refusal to take prisoners from Counties pursuant to the statutorily mandated formula mean that the prisoners will be "committed" to the county jails "by lawful authority."? If so, will TDC then be relieved of its financial obligations under the reasoning expressed-in Attorney General Opinion Nos. JM-615, 730 and 743? These, and possibly other questions are not now ripe for decision and will not be reached until they are.

I request that counsel for the Counties prepare a draft of a judgment in line with this decision and submit it to me for signature after approval as to form by opposing counsel.

Appendix E

Thank you.

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/jw
cc: Mr John Dickson
Travis County District Clerk

Appendix F

APPENDIX F – LETTER DECISION DATED AUGUST 24, 1989 – *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
AUSTIN, TEXAS 78767

August 24, 1989

Mr. Carlos Valdez
County Attorney
Nueces County Courthouse
901 Leopard, Room 206
Corpus Christi, Texas 78401-3680

Mr. Robert Ozer
Assistant Attorney General
Chief, Class Action Section
Enforcement Division
P.O. Box 12548, Capitol Station
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Appendix F

Mr. Steve Bickerstaff
Ms. Anne Clark Snell
BICKERSTAFF, HEATH & SMILEY
San Jacinto Center
Suite 1800
98 San Jacinto Blvd.
Austin, Texas 78701-4039

Re: Cause No. 452,071; The County of Nueces, Texas vs. Texas Board of Corrections, et al.

Dear Counsel:

I have decided that the suggestion of mootness filed by defendant should be denied. I request that Mr. Valdez prepare a draft of an order in line with this decision and submit it to me for signature after approval as to form by other counsel.

As things now stand, we will proceed with the hearing on October 2, 1989 at 9:00 a.m. on the question of impossibility. Please try to stipulate to as many uncontested facts as possible so as to reduce unnecessary in-court testimony. Also, please let us know your current estimates of length of time for the hearing.

Thank you.

Appendix F

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/jw
cc: Mr. John Dickson
Travis County District Clerk

Appendix G

APPENDIX G – FINAL JUDGMENT FILED AUGUST 2, 1991 – *HARRIS COUNTY v. THE STATE OF TEXAS*

No. 475,468

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

Plaintiff/Relator

vs.

THE STATE OF TEXAS; ANN RICHARDS, GOVERNOR OF THE STATE OF TEXAS; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JAMES LYNAUGH, DIRECTOR; TEXAS BOARD OF CRIMINAL JUSTICE; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; BEN GALLANT, JR.; JAMES ELLER; MAIME MOORE PROCTOR; ROBERT MANN; AND ALLAN B. POLUNSKY; AS MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE

Defendants/Respondents

FINAL JUDGMENT

BE IT REMEMBERED that on the 20th day of May, 1991, the above entitled and numbered cause came on for hearing before this Court, and Plaintiff/Relator Harris County

appeared by and through its attorney of record, and Intervenor Montgomery County appeared by and through its attorney of record, and Defendants/Respondents The State of Texas; Ann Richards, Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice, appeared by and through their attorneys of record.

By an order signed April 25, 1991, this Honorable Court granted partial summary judgment in favor of Plaintiff/Relator Harris County, and Intervenor Montgomery County against Defendants/Respondents, finding and holding that Defendants/Respondents were and are liable to Plaintiff/Relator and Intervenor for the cost of caring for, housing, incarcerating and transporting TDC ready convicted felons both in the past and in the future; and that Defendants/Respondents non-discretionary, mandatory and ministerial duty to house, care for, incarcerate and transport such convicted felons was not and is not in any way relieved or excused or in any way imposed upon any other entity by virtue of House Bill 2335 and/or Article 6166a4, V.A.C.S., and/or the allocation formula, 37 TAC 152.3, nor were Defendants/Respondents in any way excused from financial liability and responsibility for such convicted felons, nor was such financial liability and responsibility imposed upon any other entity; and that by virtue of its scheduled admissions policy and allocation formula the Defendants/Respondents have enjoyed the use and benefit of ad valorem tax money collected by Harris County and Montgomery County by using such ad valorem tax money to carry out Defendants/Respondents non-discretionary, mandatory and

ministerial duties in violation of the Constitution of the State of Texas; and that by doing so Defendants/Respondents have deprived Plaintiff/Relator Harris County and Intervenor Montgomery County of the use of their ad valorem tax revenues for county purposes; and that Plaintiff/Relator Harris County and Intervenor Montgomery County are entitled to a writ of mandamus ordering the Defendants/Respondents to reimburse and compensate Harris County and Montgomery County for carrying out Defendants/Respondents mandatory, non-discretionary and ministerial duties and responsibilities by housing, caring for, incarcerating and transporting convicted felons both in the past and in the future.

The issue of liability having been determined by the court's summary judgment of April 25, 1991 as aforesaid, on the 20th day of May, 1991, a jury having been previously demanded, and a jury consisting of twelve good and lawful jurors having been duly impaneled, the case proceeded to trial on the issue of damages.

At the conclusion of the evidence, the court submitted the case to the jury on questions. The jury did retire to deliberate its verdict, and returned into open court the following verdict and answers to the following questions.

> "STATE PRISONER" means prisoners sentenced to the state penitentiary.
>
> "PRISONER DAY" means each day or a part of a day that a state prisoner is held in a county jail, but does not include days spent in a county jail by a state prisoner who (1) is returned to county jail on a bench warrant and is awaiting further proceedings;

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(2) is awaiting trial in state court on the remainder of multiple charges; (3) is awaiting a parole revocation hearing; (4) is being held on federal detainers awaiting trial in federal court; and (5) is awaiting a pending appeal of a sentence of ten years or less and who has not exercised his or her right to be transferred to the state penitentiary immediately upon sentencing.

QUESTION NO. 1

For each state prisoner, how many prisoner days after sentencing would be reasonable for the state to accept state prisoners?

In answering this question, you may consider only the following elements and none others.

a. The reasonable amount of time after sentencing that it would take the counties to prepare the paper work required for transfer to the state, if the state were not restricting admissions of state prisoners.

b. The reasonable amount of time that it would take to arrange for transportation of such prisoners to the state, if the state were not restricting admissions of state prisoners.

Answer by indicating the number of days for each county.

Answer:

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HARRIS COUNTY	5 days
MONTGOMERY COUNTY	7 days

QUESTION NO. 2

Between September 28, 1987 and April 30, 1991, how many prisoner days, if any, did the counties hold state prisoners?

Do not include in your answer the time you have found in answer to question number one to be reasonable for the state to accept state prisoners.

Answer by giving the total number of prisoner days, if any, for each county.

Answer:

HARRIS COUNTY	2,310,214 days
MONTGOMERY COUNTY	65,256 days

QUESTION NO. 3

What is the reasonable value per prisoner day, if any, of the services provided by the counties in holding state prisoners?

Answer in dollars and cents, if any, for each county.

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Answer:

HARRIS COUNTY	$21.34
MONTGOMERY COUNTY	$17.31

Thereafter, said verdict was duly received in open court and ordered filed, and the Court being of the opinion that judgment herein should be rendered in accordance with its summary judgment of April 25, 1991 and the aforesaid verdict of the jury, it is the opinion of this court that judgment should be rendered in favor of Plaintiff/Relator Harris County and Intervenor Montgomery County and that a writ of mandamus should be issued to compel Defendants/Respondents to perform their nondiscretionary, mandatory and ministerial duty, it is therefore

ORDERED, ADJUDGED and DECREED:

1. That a pre-emptory writ of mandamus issue directing and commanding Defendants/Respondents The State of Texas; Ann Richards, Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice to cause the Texas Department of Criminal Justice to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the Institutional Division of the Texas Department of Criminal Justice or to its predecessor, the Texas Department of Corrections, or to compensate Plaintiff/Relator Harris County at a rate of $21.34 per day and Intervenor Montgomery County

at a rate of $17.31 per day for each such prisoner held in Harris County's or Montgomery County's jails and to raise any revenue necessary to pay such compensation.

2. That Defendants/Respondents' duty to provide for the care and custody of prisoners sentenced to the Institutional Division of the Texas Department of Criminal Justice or to its predecessor, the Texas Department of Corrections, or to pay compensation to Harris County and Montgomery County for holding such prisoners shall begin five calendar days after issuance of judgment sentencing and committing such prisoners to the Texas Department of Criminal 3ustice, or to its predecessor the Texas Department of Corrections in Harris County, and seven days after issuance of such judgment in Montgomery County.

3. That Defendants/Respondents shall pay to Harris County $49,299,966.76 and to Montgomery County $1,129,581.36 as the aggregate amount of compensation due to Harris County and Montgomery County for the period beginning September 28, 1987 up to and including April 30, 1991 for holding prisoners that were Defendants/Respondents' responsibility under this judgment.

4. That Defendants/Respondents shall pay to Harris County and Montgomery County compensation in accordance with this judgment for prisoners held by each county on or after May 1, 1991 that are the responsibility of Defendants/Respondents. In computing the prisoner days for which compensation is owed from Defendants/Respondents to Harris County and Montgomery County, the county shall exclude days spent in the county jail by a prisoner who (1) is returned to county jail on a bench warrant and is awaiting

further proceedings; (2) is awaiting trial in state court on the remainder of multiple charges; (3) is awaiting a parole revocation hearing; (4) is being held on federal detainers awaiting trial in federal court; and (5) is awaiting a pending appeal of a sentence of ten years or less and who has not exercised his or her right to be transferred to the state penitentiary immediately upon sentencing.

5. That Harris County and Montgomery shall submit invoices to Defendants/Respondents for payment of compensation for prisoners held by the counties on or after May 1, 1991, for which Defendants/Respondents are responsible under this judgment.

6. That Harris County's and Montgomery County's invoices for compensation for the period from and after May 1, 1991 to the date of entry of this judgment shall be presented to Defendants/Respondents by each county by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which this judgment is entered. Thereafter, the counties' invoices for compensation shall be presented by each county to Defendants/Respondents by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which compensation to the county accrues under this judgment.

7. That a constructive trust is hereby imposed on all funds now and hereafter found, deposited and/or on deposit in the State treasury for the purposes of satisfying this judgment and reimbursing Harris County and Montgomery County for housing, caring for, incarcerating and transporting state prisoners both in the past and in the future.

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8. That the judgment hereby rendered shall bear post-judgment interest in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of 10% from the date of judgment until paid.

9. That the judgment hereby rendered shall bear pre-judgment interest in accordance with Tex.Rev.Civ.Stat.Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of 10% from June 6, 1990 through the date the judgment is signed.

10. That all costs of court be taxed against Defendants/Respondents.

It is further ORDERED that Defendants/Respondents shall not by this judgment be relieved of carrying out their obligations under any other relevant order issued by a court of competent jurisdiction, including the agreed orders Defendants/Respondents have entered into in *Ruiz v. Lynaugh*, No. 78-087-CA; provided, however, that Defendants/Respondents shall not be precluded from seeking modifications to such orders.

SIGNED this 2nd day of August, 1991.

s/ Joseph H. Hart
JOSEPH H. HART
JUDGE, 126TH JUDICIAL
DISTRICT COURT
TRAVIS COUNTY, TEXAS

Appendix G

APPROVED AND ENTRY REQUESTED:

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Harris County Attorney

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ATTORNEYS FOR PLAINTIFF/RELATOR
HARRIS COUNTY, TEXAS

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ATTORNEYS FOR INTERVENOR
MONTGOMERY COUNTY, TEXAS

Appendix H

APPENDIX H – PEREMPTORY WRIT OF MANDAMUS FILED AUGUST 2, 1991 – *HARRIS COUNTY v. THE STATE OF TEXAS*

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

NO. 475,468

HARRIS COUNTY, TEXAS

Plaintiff/Relator

v.

THE STATE OF TEXAS; ANN RICHARDS, GOVERNOR OF THE STATE OF TEXAS; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JAMES LYNAUGH, DIRECTOR; TEXAS BOARD OF CRIMINAL JUSTICE; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; BEN GALLANT, JR.; JAMES ELLER; MAIME MOORE PROCTOR; ROBERT MANN; AND ALLAN B. POLUNSKY; AS MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE

Defendants/Respondents

PEREMPTORY WRIT OF MANDAMUS

On April 25, 1991, this Court granted partial summary judgment in the above numbered and styled cause finding the

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Respondents, The State of Texas; Ann Richards, Governor of the State of Texas, Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice have a ministerial, mandatory, nondiscretionary duty to take custody of inmates sentenced by a trial court to the custody of Texas Department of Corrections or its successor agency Texas Department of Criminal Justice.

This Court further found that Respondents had not established legal impossibility or any of the defenses that would preclude issuance of a writ of mandamus and that pursuant to a jury verdict returned May 30, 1991, Respondents have a duty to reimburse the Relator Harris County, Texas and the Intervenor Montgomery County, Texas ("Counties") by paying reasonable compensation in the amount of $21.34 as to Harris County and $17.31 as to Montgomery County per day for the care, treatment, feeding, clothing and management of the inmates that the State should have taken. The compensation should begin to accrue five days in the case of Harris County and accrue seven days in the case of Montgomery County after the date of the judgment and sentence of the court ordering confinement in the Texas Department of Criminal Justice. Respondents have a duty to take all actions necessary to obtain funds required to pay such amounts of compensation.

The Counties have demanded that Respondents perform their duty to take inmates and Respondents have unjustly refused and still refuse to take or make provisions for the inmates.

Appendix H

Respondents show by their acts of refusal to perform the ministerial duty to take the inmates that it is futile for the Counties to issue formal demands for compensation and this Court dispenses with the need for a formal demand and refusal.

The Respondents' failure to fulfill their duty as outlined above has resulted in manifest injury to the Counties.

Therefore, this Court commands Respondents to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections, or to compensate the Counties at-the rate of $21.34 as to Harris County and $17.31 as to Montgomery County per day for each such prisoner held in the Counties' jails after five days from the date of judgment and sentence in the case of Harris County and after seven days from the date of judgment and sentence in the case of Montgomery County.

This Court further commands Respondents to pay to the Counties the aggregate amount of compensation at the rate of $21.34 per day as to Harris County and $17.31 per day as to Montgomery County which has accrued for all periods up to and including April 30, 1991, for holding prisoners that Respondents failed to provide for under Respondents' duty to provide for the care and custody of all persons sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections and to continue paying amounts that become due until such time as Respondents carry out their duty as outlined above. The aggregate amounts due each County are:

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Harris	$49,299,966.76
Montgomery	$1,129,581.36

Further, this Court commands Respondents to take all action necessary to obtain funds to pay reasonable compensation.

You are hereby further commanded to make return to this writ before this Court on November 4, 1991 at the Travis County Courthouse, stating how you have executed or what you have done in compliance to this writ and have you then and there this writ.

SIGNED this 2nd day of August, 1991.

s/ Joseph H. Hart
JOSEPH H. HART, JUDGE
126th Judicial District Court
Travis County, Texas

Appendix I

APPENDIX I – SUPPLEMENTAL COMPLAINT DATED SEPTEMBER 15, 1989 – *ALBERTI v. JOHNNY KLEVENHAGEN*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO H-72- 1094

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs,

V.

JOHNNY KLEVENHAGEN, ET AL.,

Defendants.

and

WILLIAM P. CLEMENTS; JAMES LYNAUGH; CHARLES T. TERRELL; BEN J. GALLANT, ALLAN BRUCE POLUNSKY; JAMES M. ELLER; F. L. "STEVE" STEPHENS; MAMIE MOORE PROCTOR ROBERT MANN; JERRY H. HODGES; HENRY B. KEENE, RUBEN M. TORRES, CHRIS A. MEALY, WINONA W. MILES, JAMES H. GRANBERRY, WENDELL A. ODOM AND THE STATE OF TEXAS

Rule 19 Defendants.

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SUPPLEMENTAL COMPLAINT

LAWRENCE R. ALBERTI, et al., and the class composed of all persons in the Harris County who are under the custodianship of the Harris County Sheriff, respectfully allege as follows:

I.

ADDITIONAL DEFENDANTS

WILLIAM P. CLEMENTS is the Governor of the State of Texas. He is sued in his official capacity.

JAMES LYNAUGH is the Director of the Texas Department of Corrections. He is sued in his official capacity.

CHARLES T. TERRELL is of the Texas Board of Criminal Justice. He is sued in his official capacity.

BEN GALLANT is a board member on the Texas Board of Criminal Justice. He is sued in his official capacity.

MAMIE MOORE PROCTOR is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

ALLAN BRUCE POLUNSKY is a board member on the Texas Board of Criminal Justice. He is sued in his official capacity.

JAMES M. ELLER is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

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F. L. "STEVE" STEPHENS is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

ROBERT MANN is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

JERRY H. HODGES is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

HENRY B. KEENE is the Chairman of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

RUBEN M. TORRES is the Vice Chairman of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

CHRIS A. MEALY is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

WINONA W. MILES is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

JAMES H. GRANBERRY is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

WENDELL A. ODOM is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

THE STATE OF TEXAS is a sovereign state with ultimate responsibility for the care and custody of convicted felons.

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II.

JURISDICTION

The Court has continuing jurisdiction over this matter and the County of Defendants by virtue of the Consent Judgment entered in this civil action on February 4, 1975. Additionally the Court has jurisdiction over the State of Texas Defendants by virtue of 42 U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343, and the All Writs Act, 28 U.S.C. § 1651.

III.

EVENTS OCCURRING SINCE ENTRY OF THE CONSENT JUDGMENT

On February 4, 1975, Plaintiffs and the County Defendants executed and the Court approved a Consent Judgment, whereby the County Defendants agreed to reduce the overcrowding in the Harris County Jail. Through this consent Judgment and a December 16, 1975, Memorandum and Opinion, *Alberti v. Klevenhagen*, 406 F. Supp. 649 (S.D. Tex. 1975), the Court retained jurisdiction to enter any interim orders necessary to effectuate compliance with the Consent Judgment and has monitored such compliance, entering other remedial orders.

On April 28, 1987, the Court appointed a Special Master and two Monitors ("the Monitors") to oversee the County Defendants' compliance efforts. *Alberti v. Klevenhagen*, 660 F. Supp. 605 (S.D. Tex. 1987). On December 17, 1987, the Court entered an Order which directed the Monitors to assess the overcrowding problem in the Jail. On September 12, 1988, the

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Monitors filed their Findings of Fact and Recommendations, determining that:

> The Jail is dangerously overcrowded. All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care and mental health services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

The Monitors have recommended (Monitors' Recommendations on Population April 11, 1989) that the Court, within 30 days from entry of the order impose a maximum capacity on the Harris County jail is an overall population of 7,000 inmates with no more than 1,000 housed in the Detention Center; within 90 days of the entry of the Courts' Order, reducing the total inmate population to 6,400, with no more than 900 being housed in the Detention Center; within 180 days, of the entry of the Courts' Order, reducing the total population of Harris County facilities to 5,800, with no more than 810 being housed in the Detention Center; within 270 days, reduce the total inmate population of Harris County facilities to 5,200, with no more than 810 being housed in the Detention Center; with completion of the new jail, or in any case no later than June 1, 1991, the defendant must reduce the population of all of their facilities to 100 percent of their design capacity of 8,732 (3,505 for the Jail, 810 for the Detention Center, 417 for the 301 Building; 4,000 for the new jail) by June 1, 1991. Moreover in open Court on September 13, 1989, at a hearing where

constitutionality was at issue, the Attorney General of Texas appearing on behalf of the State of Texas judicially conceded that the living conditions at the Harris County Jail including overcrowding are so egregious as to be in violation of the United States Constitution. Likewise on September 12, 1989, in open Court at the same hearing, the County Attorney appearing on behalf of Defendant Klevenhagen conceded that the living conditions at the Harris County Jail including overcrowding are so egregious as to be in violation of the United States Constitution.

IV.

INVOLVEMENT OF THE STATE DEFENDANTS

Despite its statutory responsibility to accept convicted felons into its facilities, TEX. CODE CRIM. PROC. ANN. art. 42.09; TEX. PENAL CODE §§ 12.32 - 12.34; *Todd v. State,* 598 F.2d 286, 292 (Tex. Crim. App. 1980), the State of Texas by and through its officials has refused to accept its prisoners presently incarcerated in the Harris County Jail.

William Clements, Governor of the State of Texas, is empowered to invoke the Prison Management Act by "certify[ing] that an emergency overcrowding situation exists, and ... order[ing] the director [of TDC] to credit not more than 90 days of administrative good time to all eligible inmates." TEX. REV. CIV. STAT. ANN. art. 61840. He has, however, taken no steps to invoke the Act and alleviate TDC's overcrowding, which in turn would reduce the numbers held in the Harris County Jail.

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James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, of the Texas Board of Criminal Justice; Ben J. Gallant; Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Mamie Moore Proctor, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Criminal Justice, are vested with the exclusive management and control of TDC. TEX. REV. CIV. STAT. ANN. art. 6166q. Furthermore, these individuals, acting in their official capacities, are responsible for "mak[ing] suitable provisions and regulations for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services . ." TEX. REV. CIV. STAT ANN art. 6166r.

Henry B. Keene, Chairman of the Texas Board of Pardons and Paroles, Ruben M. Torres, Chris A. Mealy, Winona W. Miles, James H. Granberry, Wendell A. Odom, Board Members on the Texas Board of Pardons and Paroles are vested with the exclusive authority to administer the provisions of the Adult Probation, Parole, and Mandatory Supervision Law, Tex. Crim. Proc. Ann. art. 42.12 and to determine which prisoners shall be paroled from TDC, the conditions of their parole and mandatory supervision including the degree and intensity of supervision a prisoner released on parole or released to mandatory supervision should receive.

Although a substantial number of persons currently incarcerated in the Harris County Jail are convicted felons who are eligible for parole, their paroles are being delayed because of the lack of prompt processing by the Texas Board of Pardons and Paroles.

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Convicted felony jail inmates are denied the same consideration for good time and trustee time as inmates transferred to the penitentiary (Institutional Division). Inmates in jail are not given credit for good time presented through the Prison Management Act. Jail inmates who are jail trustees are not awarded additional trustee time credits that they would earn if they had been transferred to the penitentiary. Awarding good time and trustee time based upon whether a person is sent by the Sheriff to the penitentiary (Institutional Division) is an unreasonable classification and constitutes a violation of the equal protection clause of the fourteenth amendment.

V.

CONSTITUTIONAL BASIS

The foregoing actions by the Rule 19 defendants have cause plaintiffs to suffer deprivations of the rights secure by the fourteenth amendment (due process and equal protection) and the eighth amendment (cruel and unusual punishment) and their participation is necessary to achieve complete relief.

WHEREFORE, Plaintiffs pray that the above-named State officials be cited to appear and that upon final hearing of this matter, the Court entered such Orders as are appropriate to eliminate the unconstitutional conditions that exist at the Harris County Jail facilities and to effectuate full compliance with the Consent Judgment entered by this Court on February 4, 1975.

Plaintiffs further pray for such other and further relief, including reasonable attorneys fees and costs, to which Plaintiffs may show themselves justly entitled.

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Respectfully submitted,

s/ James T. Oitzinger
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CO-COUNSEL FOR PLAINTIFF

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By James Oitzinger, with
permission
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CO-COUNSEL FOR PLAINTIFF

Appendix I

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 1989, a true and correct copy of the foregoing Plaintiffs' Supplemental Complaint was served upon the following counsel of record by Hand Delivery in the courtroom of Judge James DeAnda:

Mr. Harold Streicher
Assistant County Attorney
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Houston, Texas 77002

Mr. Roderick Lawrence
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Ms. Lisa Rice
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Mr. Robert Ozer
Assistant Attorney General
Supreme Court Building
P . O . Box 12548
Capitol Station
Austin, Texas 78711

s/ James T. Oitzinger
JAMES T. OITZINGER

Appendix J

APPENDIX J – THIRD PARTY COMPLAINT FILED JANUARY 13, 1989 – *ALBERTI v. SHERIFF OF HARRIS COUNTY (WITHOUT EXHIBITS)*

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 72-H-1094

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs

vs.

THE SHERIFF OF HARRIS COUNTY, ET AL.,

vs.

WILLIAM P. CLEMENTS; JAMES LYNAUGH; CHARLES T. TERRELL; DERALYN R. DAVIS; JOSEPH V. LAMANTIA; ALLAN BRUCE POLUNSKY; JAMES M. ELLER; F.L. "STEVE" STEPHENS, DENNIS R. HENDRIX; ROBERT MANN; JERRY H. HODGES (each in his or her official capacity).

THIRD PARTY COMPLAINT

THE SHERIFF OF HARRIS COUNTY, TEXAS, and HARRIS COUNTY, TEXAS, by and through its COMMISSIONERS COURT, DEFENDANTS and THIRD PARTY PLAINTIFFS

herein, complaining of William F. Clements, Governor of the State of Texas; James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, each in his or her official capacity, respectfully allege as follows:

I. Parties

1. Johnny Klevenhagen is the SHERIFF OF HARRIS COUNTY, TEXAS, and a defendant in the underlying action filed pursuant to 42 U.S.C.A. § 1983 (West 1981).

2. HARRIS COUNTY, TEXAS, a political subdivision of the State, Jon Lindsay, the HARRIS COUNTY JUDGE, and Harris County Commissioners E.A. Lyons, Jim Fonteno, El Franco Lee and Steve Radack, all of whom are members of the HARRIS COUNTY COMMISSIONERS COURT, which is the governing body of Harris County, Texas, are defendants in the underlying action filed pursuant to 42 U.S.C.A § 1983 (West 1981).

3. WILLIAM P. CLEMENTS is the Governor of the State of Texas, and may be served by mail at P.O. Box 12428, State Capitol, Austin, Texas 78711.

4. JAMES LYNAUGH is the Director of the Texas Department of Corrections and may be served by mail at P.O. Box 99, Huntsville, Texas 77340.

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5. CHARLES T. TERRELL is the Chairman of the Texas Board of Corrections and may be served by mail at P.O. Box 35948, Dallas, Texas 75235.

6. DERALYN R. DAVIS is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 15126, Fort Worth, Texas 76110.

7. JOSEPH V. LAMANTIA is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 1003, Weslaco, Texas 78596.

8. ALLAN BRUCE POLUNSKY is a board member on the Texas Board of Corrections and may be served by mail at 1 Forum 16th Floor, 8000 Interstate Highway 10 West, San Antonio, Texas 78230,

9. JAMES M. ELLER is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box GJ, College Station, Texas 77841.

10. F.L. "STEVE" STEPHENS is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 5581, San Angelo, Texas 76902.

11. DENNIS R. HENDRIX is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 2521, Houston, Texas 77252.

12. ROBERT MANN is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 8436, Waco, Texas 76714.

13. JERRY H. HODGES is a board member on the Texas Board of Corrections and may be served by mail at 25 Medical Drive, Amarillo, Texas 79106.

II. JURISDICTION

14. The Court has jurisdiction pursuant to 42 U.S.C. § 1343(3) (West Supp. 1988).

15. Additionally, the Court has pendent jurisdiction of the claims against the Third Party Defendants in the Third Party Complaint arises out of the matters alleged in the Original Complaint filed in this cause.

III. CAUSE OF ACTION

16. On August 14, 1972, Plaintiffs filed a Complaint against Defendants, contending, *inter alia*, that the overcrowded conditions existing in the Harris County Jail violated their constitutional rights. *See* Exhibit A. On February 4, 1975, the parties executed and the Court approved a Consent Judgment, where by Defendants agreed to reduce the overcrowding in the Harris County Jail. *See* Exhibit B. Through this Consent Judgment and a December 16, 1975 Memorandum and Opinion, *Alberti v. Klevenhagen*, 406 F.Supp. 649 (S.D. Tex. 1975), the Court retained jurisdiction to enter any interim orders necessary to effectuate compliance, entering other remedial orders. *See* Exhibit B at 5.

17. On April 28, 1987, the Court appointed Special Master and two Monitors ("the Monitors") to oversee the Defendants' compliance efforts. *Alberti v. Klevenhagen*, 660 F.Supp. 605 (S.D. Tex. 1987). On December 17, 1987, the Court entered an

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Order which directed the Monitors to assess the overcrowding problem in the Jail. On September 12, 1988, the Monitors filed their Findings of Fact and Recommendations, determining that:

> The Jail is dangerously overcrowded. All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting supplies of clothing and bedding, security, medical care and mental health services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

See Exhibit C at 26. The Monitors stressed that the State of Texas, not the Defendants, caused and was responsible for the current overcrowding dilemma:

> It should be re-emphasized in the strongest of terms that Harris County has addressed its responsibilities fully and well. The culprit here is the State of Texas which has failed to provide adequate constitutional housing for its offender population and has gotten away so far with simply exporting the results of its failure to the counties. The anomalous result is that while the State is subject to a 95 percent cap by one federal district court, one of its subdivisions is being pushed to demand permission of another federal district court to overpopulate its facilities limitlessly.

See Exhibit C at 28 (emphasis added). The Monitors recommended that the Court impose a ceiling capacity on the Harris County Jail, reducing its overall population to 120 percent of total design capacity within 60 days of the entry of the Court's Order; to 110 percent of total design capacity by the time the 301 San Jacinto Jail's renovation has been completed; and to 95 percent of total design capacity by June 1, 1991. *See* Exhibit C at 29.

18. On November 8, 1988, the Court entered an Order requiring the SHERIFF to transport and deliver to the Texas Department of Corrections ("TDC") at least 290 "convicted felons ready for transfer to TDC" per week each week beginning December 5, 1988, finding that:

> [D]angerously overcrowded conditions exist in the Harris County correctional facilities [that] have been exacerbated substantially, if not caused primarily or solely, by the failure of TDC to receive convicted felons ready for transfer to the TDC in sufficient numbers and in a sufficiently timely manner to alleviate the overcrowded and dangerous conditions which exist within Harris County correctional facilities. The Court also finds that such circumstances have interfered substantially with the defendants' efforts to achieve compliance with the terms and mandates of the original consent decree and subsequent orders in this case. The court further finds that because of the severe overcrowding conditions presently existing in the Harris County detention facilities, the Sheriff should not be housing convicted felons ready for transfer to the TDC in Harris County correctional facilities for

> any period of time longer than minimally and reasonably required to complete the paperwork relating to such persons and effectuate their transportation and delivery to TDC.

See Exhibit D at 4 - 5, 6.

19. Despite its statutory responsibility to accept convicted felons into its facilities, TEX. CODE CRIM. PROC. ANN. art. 42.09 (West Supp. 1988); TEX. PENAL CODE §§ 12.32 - 12.34 (West 1974 & Supp. 1988); *Todd v. State*, 598 F.2d 286, 292 (Tex. Crim. App. 1980), and contrary to the Court's remedial Order concerning Plaintiffs' adjudicated constitutional rights, the State, by and through its officials, has refused to accept its prisoners, stating that "the Texas Department of Corrections will not accept prisoners from Harris County, or any other county of the State of Texas, above the number allocated pursuant to the scheduled admissions policy." *See* Exhibit E.

20. Given this refusal, and without statutory authority to simply release TDC ready felons, *see* TEX. CODE CRIM. PROC. ANN. 42.09 (West Supp. 1988), the SHERIFF and HARRIS COUNTY cannot achieve compliance with the Court's November 8, 1988, Order and protect PLAINTIFFS' adjudicated rights without joining THIRD PARTY DEFENDANTS and securing injunctive relief against them. On December 12, 1988, the Sheriff reported his inability to achieve compliance with the Court's Orders. *See* Exhibit F.

21. William P. Clements, Governor of the State of Texas; James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan

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Bruce Polunsky, James Eller, F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, are liable to THIRD PARTY PLAINTIFFS for THIRD PARTY PLAINTIFFS' inability to comply with the Court's November 8, 1988 Order, which found that dangerously overcrowded conditions exist in the Harris County Jail. *See* Exhibit D at 4 - 5.

22. William Clements, Governor of the State of Texas, is empowered to invoke the Prison Management Act by "certify[ing] that an emergency overcrowding situation exists, and ... order[ing] the director [of TDC] to credit not more than 90 days of administrative good time to all eligible inmates." TEX. REV. CIV. STAT. ANN. art. 6184O (West Supp. 1988). He has, however, taken no steps to invoke the Act and alleviate TDC's overcrowding, which in turn would reduce the numbers held in the Harris County Jail.

23. James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller,-F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, are vested with the exclusive management and control of TDC. TEX. REV. CIV. STAT. ANN. art. 6166g (West 1970). Furthermore, these individuals, acting in their official capacities, are responsible for "mak[ing] suitable provision and regulations for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services. . . " TEX. REV. CIV. STAT. ANN. art. 6166r (West 1970). Notwithstanding the fact that the Sheriff has demonstrated his

willingness to perform such services, *see* Exhibit F, THIRD PARTY DEFENDANTS have failed to make such provisions and regulations, and in fact have established a transfer system which balances their population by forcing the Harris County Jail to become a state penitentiary.

24. By reason of the THIRD PARTY DEFENDANTS' failure to accept their prisoners as required by state law, the THIRD PARTY DEFENDANTS are liable to the THIRD PARTY PLAINTIFFS, who cannot achieve compliance with the Court's Orders and protect PLAINTIFFS' adjudicated constitutional rights. The THIRD PARTY PLAINTIFFS have no adequate remedy at law and will suffer irreparable injury if the relief requested is not granted.

IV. RELIEF

WHEREFORE, premises considered, THIRD PARTY PLAINTIFFS demand judgment against the THIRD PARTY DEFENDANTS, each in his or her official capacity, and their agents, employees and those acting in active concert with them, ordering them to immediately remove from the Harris County Jail, all persons who are currently "convicted felons ready for transfer to TDC", as defined in the Court's November 8, 1988 Order, and to continue thereafter to remove from the Harris county Jail all persons who become "convicted felons ready for transfer to TDC." *See* Exhibit D at 5 - 6. THIRD PARTY PLAINTIFFS further seek such other and further relief to which they may show themselves entitled under both law and equity.

Appendix J

Respectfully submitted,

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Appendix K

APPENDIX K – ORDER FILED OCTOBER 10, 1990–IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90-2810

IN RE: WILLIAM P. CLEMENTS, JR., ET AL.,

Petitioners.

On Petition for Writ of Mandamus

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

BY THE COURT:

It appearing that all counsel now agree that the stay entered by this court on September 21, 1990 is no longer necessary, it is hereby VACATED, without prejudice.

Our decision to vacate the stay is premised on two points. First, we understand that the district court will not authorize release of felony offenders without sufficient notice for application by any party for further stay by this court.

Second, we understand that the parties are working to obtain a process that will protect the public safety and the integrity of the criminal justice system as well as the rights of prisoners. In this regard, it is significant that the state of Texas sees the *Ruiz* decree as a potential impediment to the flow of state prisoners from county facilities to its custody. We repeat:

such superintending injunctions must (1) be tailored to the found wrong; and (2) impose limits upon state institutions no greater than is necessary to remedy found deprivations of constitutional rights; and (3) be modified to reflect changing conditions, including any change in threats to the public safety as well as changes in the prison conditions that supported the extant decree. *See Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987) (Hill, J., specially concurring).

Appendix L

APPENDIX L – ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN *ALBERTI*

Texas Constitutional Provisions

Tex. Const. art. VIII, § 1-a (Vernon 1984):

> The several counties of the State are authorized to levy ad valorem taxes upon all property within their respective boundaries for county purposes . . .

1. Tex. Penal Code Ann. § 12.31(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by confinement in the Institutional Division of the Texas Department of Criminal Justice for life or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by confinement in the institutional division for life.

2. Tex. Penal Code Ann. § 12.32(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a felony of the first degree shall be punished by confinement in the Texas Department of Corrections for life or for any term of not more than 99 years or less than 5 years.

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3. Tex. Penal Code Ann. § 12.33(a) (Vernon 1974)

> An individual adjudged guilty of a felony of the second degree shall be punished by confinement in the Texas Department of Corrections for any term of not more than 20 years or less than 2 years.

4. Tex. Penal Code Ann. § 12.34(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a felony of the third degree shall be punished by: (1) confinement in the institutional division of the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years; (2) confinement in a community correctional facility for any term of not more than 1 year.

5. Tex. Penal Code Ann. § 12.42 (Vernon 1974 & Supp. 1992)

> (a) If it be shown on the trial of a third-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a second-degree felony.
>
> (b) If it be shown on the trial of a second-degree felony that the defendant has been once before convicted of any felony, on

conviction he shall be punished for a first-degree felony.

(c) If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years . . .

(d) If it be shown on the trial of any felony offense that the defendant has been once before convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 25 years.

6. Tex. Crim. Proc. Code Ann. art. 42.09 §§ 1-4 (Vernon Supp. 1992)

§ 1. Except as provided in Sections 2 and 3, a defendant shall be delivered to jail or to the Department of Corrections when his sentence to imprisonment is announced, or his sentence to death is announced by the court . . .

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§ 2. If a defendant appeals his conviction and is released on bail pending disposition of his appeal, when his conviction is affirmed, the clerk of the trial court on receipt of the mandate from the appellate court, shall issue a commitment against the defendant. The officer executing the commitment shall endorse thereon the date he takes the defendant into custody and the defendant's sentence begins to run from the date endorsed on the commitment. The Department of Corrections shall admit the defendant named in the commitment on the basis of the commitment.

§ 3. If a defendant is convicted of a felony and sentenced to death, life, or a term of more than ten years in the Department of Corrections and he gives notice of appeal, he shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals.

§ 4. If a defendant is convicted of a felony and his sentence is a term of ten years or less and he gives notice of appeal, he shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals upon request in open court or upon written request to the sentencing court. Upon a valid transfer to the Department of

Appendix L

> Corrections under this section, the defendant may not thereafter be released on bail pending his appeal.

7. Tex. Rev. Civ. Stat. Ann. art. 6166r (in effect from 1927 -- August 31, 1989) (recodified at Tex. Gov. Code Ann. § 499.006 (Vernon 1990) (deleting "speedy") and recodified later at Tex. Gov. Code Ann. § 500.006 (Vernon Supp. 1992))

> The [Director of the Texas Department of Corrections] shall make suitable provision and regulation for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services as cheaply as said commission can have it done otherwise. Said transportation shall be on State account . . .

8. Tex. Gov't Code Ann. § 493.001 (Vernon Supp. 1992) (formerly Tex. Rev. Civ. Stat. Ann. art. 4413(401) § 1.02(a))

> The [Texas Department of Criminal Justice] is the State agency with primary responsibility for: (1) the confinement, supervision, and rehabilitation of felons; (2) the development of a system of state and local punishment, supervision, and rehabilitation programs and facilities; and (3) the reintegration of felons into society after release from confinement.

Appendix L

9. Tex. Gov't Code Ann. 495.001(a) (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.001(a) (Vernon 1990))

> The board [of Criminal Justice] may contract with a private vendor or with the commissioners court of a county for the financing, construction, operation, maintenance, or management of a secure correctional facility.

10. Tex. Gov't Code Ann. § 495.004 (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.004 (Vernon 1990))

> A private vendor or county operating under a contract authorized by this subchapter may not: (1) compute inmate release and parole eligibility dates; (2) award good conduct time; (3) approve an inmate for work, medical, or temporary furlough or for preparole transfer; or (4) classify an inmate or place an inmate in less restrictive custody than the custody ordered by the institutional division.

APPENDIX M – MOTION TO DEFER PROCEEDINGS ON PETITION FOR WRIT OF CERTIORARI – IN THE UNITED STATES SUPREME COURT

No. 91-1202
OCTOBER TERM 1991

ANN RICHARDS, GOVERNOR 0F TEXAS, ET AL.
Petitioners.

v.

THE SHERIFF OF HARRIS COUNTY, ET AL.
Respondents.

v.

LAWRENCE R. ALBERTI, ET AL.
Respondents.

MOTION TO DEFER PROCEEDINGS ON PETITION FOR WRIT OF CERTIORARI PENDING DECISION IN *ALBERTI V. SHERIFF OF HARRIS COUNTY V. RICHARDS, ET AL.*
Nos. 91-2946, 91-6062, 91-6206

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME Governor Ann Richards, James A. Lynaugh, Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F.

Appendix M

L. Stephens, Jerry H. Hodge, Joshua Allen, Sr., and Ellen J. Halbert (hereinafter "State Appellants" or "State Defendants") by and through the Attorney General of Texas, Dan Morales, and file this Motion to Defer Proceedings Pending Decision in *Alberti v. Sheriff of Harris County v. Richards, et al.*, Nos. 91-2946, 91-6062, 91-6206.

I.

As more fully set forth in their Petition for a Writ of Certiorari (filed concurrently with this motion) this case arises from a decision of the Fifth Circuit entered on July 25, 1991 styled *Alberti v. Sheriff of Harris County, et al. v. Richards, et al.*, 937 F.2d 984 (5th Cir. 1991). The petition for panel rehearing was denied on October 22, 1991.

II.

Petitioners maintain that under Article III of the Constitution, principles of federalism and the Eleventh Amendment, federal courts do not have authority to resolve a state law dispute between two state governmental entities and to order state officials to compensate a political subdivision of the State of Texas. Alternatively, Petitioners contend federal courts should abstain from exercising that authority. Petitioners also challenge the equation of design capacity with constitutional capacity for the Harris County (Houston, Texas) jail. These issues appear ready for this court's review and Petitioners maintain that the court should grant certiorari and decide this case.

However, the Fifth Circuit also provisionally approved a finding of liability against the Petitioners herein (State

Defendants below) but remanded to the district court, in light of this court's recent decision in *Wilson v. Seiter*, __ U.S. __, S.Ct. 2321 (1991) for findings on whether the defendants had been "deliberately indifferent" to the significant human needs of the inmate Plaintiffs. The district court, as noted in the Petition for Certiorari at 5 n.3, has entered an order finding deliberate indifference and thus liability against State Defendants. That finding is currently the subject of a consolidated appeal in the Fifth Circuit styled *Alberti v. Sheriff of Harris County v. Richards, et al.*, Fifth Circuit Nos. 91-2946, 91-6062, 91-6206 (hereinafter *Alberti* II).

III.

While this Court certainly has jurisdiction to decide (if necessary) the *Seiter* issue and rule as a matter of law that State Defendants were not deliberately indifferent, it may be more prudent in terms of this Court's resources and the resources of the parties involved for proceedings on the petition for certiorari filed herein to be deferred pending decision below in *Alberti* II so that all possible issues raised by this petition are properly before this Court.

Alberti II has been expedited. Petitioners herein and the County Defendants filed their briefs on January 13, 1991, the Plaintiffs are scheduled to respond by February 3, 1992 and reply briefs are due by February 24, 1992. Petitioners will advise the office of the Clerk of the Court as to the progress of proceedings in the Fifth Circuit.

IV.

Appendix M

WHEREFORE, PREMISES CONSIDERED, Petitioners request that this Court defer all proceedings on their petition for writ of certiorari pending decision by the United States Court of Appeals in *Alberti v. Sheriff of Harris County v. Richards, et al.*, Nos. 91-2946, 91-6062, 91-6206, and for such other relief as this Court may deem just, fair and equitable.

Respectfully submitted,

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Appendix M

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PROOF OF SERVICE

I do hereby certify that a copy of State Petitioners' Motion to Defer Proceedings Pending Decision in *Alberti v. Sheriff of Harris County v. Richards, et al.*, Nos. 91-2946, 91-6062, 91-6206 has been served by first class United States Mail, postage prepaid on this the 17th day of January, 1992, addressed to HAROLD M. STREICHER, Assistant County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002; LISA S. RICE, Assistant County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002; JAMES OITZINGER, 1932 Wroxton, Houston, Texas 77005; GERALD M. BIRNBERG, Williams, Birnberg & Anderson, 6671 S.W. Freeway, Suite 303, Houston, Texas 77074-2209; J. MICHAEL KEATING, Tillinghast, Collins & Graham, One Old Stone Square, Providence, Rhode Island 02903; VINCENT M. NATHAN, Law Offices of Nathan & Roberts, 644 Spitzer Building, 520 Madison Avenue, Toledo, Ohio 43604.

s/ Robert Ozer
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Assistant Attorney General

Supreme Court, U.S.
FILED
JUN 01 1993
OFFICE OF THE CLERK

No. 92-1648

IN THE

Supreme Court of the United States

October Term, 1992

ANN RICHARDS, GOVERNOR OF TEXAS; CAROL S. VANCE, JERRY H. HODGE, JOSHUA W. ALLEN, SR., ELLEN J. HALBERT, CLARENCE N. STEVENSON, ALLAN B. POLUNSKY, R. H. DUNCAN, SR., GILBERTO HINOJOSA, JOHN R. WARD, MEMBERS, TEXAS BOARDOF CRIMINAL JUSTICE; AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Petitioners

v.

JON LINDSAY, HARRIS COUNTY JUDGE; EL FRANCO LEE, JIM FONTENO, STEVE RADACK, AND JERRY EVERSOLE, HARRIS COUNTY COMMISSIONERS; and JOHNNY KLEVENHAGEN, HARRIS COUNTY SHERIFF,

Respondents

v.

LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE' J. PINA, II, PAT REED, AND WESLEY SELLERS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ALBERTI, ET AL. (PLAINTIFFS-INMATE CLASS)

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June 1, 1993

QUESTIONS PRESENTED

1. Whether, under principles of federalism and Article III of the Constitution, federal courts have jurisdiction to decide questions of state law which have only been addressed by state lower courts, where the parties to the dispute in federal court include two levels of state government (in addition to other non-governmental parties) and state fiscal policy and complex regulatory schemes are impacted by the federal court's ruling, at least where it is possible to afford relief to the non-governmental party without resolving the dispute between the two branches of state government?

2. Whether a federal court's order that requires state officials, who have been found to have acted with deliberate indifference to the serious needs of convicted inmates, to participate in the elimination of ongoing constitutional violations by funding part of the prospective relief decreed is in violation of the Eleventh Amendment where there would be no constitutional constraint against requiring the other defendants in the case to provide (and pay for) the entire remedy themselves?

3. Whether, under principles of federalism, federal courts should abstain from deciding, or, alternatively, certify to the state supreme court, questions of state law concerning the meaning of subsequently superseded state law, where the state's lower courts have interpreted the superseded law, but the state's appellate courts have not done so, and the parties to the dispute in federal court include two levels of state government (in addition to other non-governmental parties), state fiscal policy and complex regulatory schemes are impacted by the federal court's ruling, and it is possible to afford interim relief to the non-governmental party (without finally resolving the dispute between the two branches of state government) while the state appellate courts consider the state law issues?

4. Whether state officials can possess the requisite culpable mental state of mind to be found liable for unconstitutional conditions in a local jail under *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991), where they knew that the consequences of their official policies would be to condemn state-ready prisoners and other inmates to be subjected to objectively cruel and unconstitutional conditions in the local jail and at least five lower court decisions had established that they had a duty to remove prisoners from those conditions, but no state appellate court had specifically so held?

5. Whether the Due Process Clause, of its own force, requires minimal standards for the confinement of pretrial detainees, apart from the protection against cruel and unusual punishment provided by the Eighth Amendment, which are not necessarily satisfied simply by jailers refraining from acting with "deliberate indifference" to the serious needs of inmates?

Stated alternatively, whether the "deliberate indifference" standard articulated in *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991) and other Eighth Amendment cases, is applicable in cases involving the treatment, housing, and constitutional rights of pretrial detainees?

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No. 92-1648

IN THE
Supreme Court of the United States
October Term, 1992

ANN RICHARDS, GOVERNOR OF TEXAS; CAROL S. VANCE, JERRY H. HODGE, JOSHUA W. ALLEN, SR., ELLEN J. HALBERT, CLARENCE N. STEVENSON, ALLAN B. POLUNSKY, R. H. DUNCAN, SR., GILBERTO HINOJOSA, JOHN R. WARD, MEMBERS, TEXAS BOARD OF CRIMINAL JUSTICE; AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR,TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Petitioners

v.

JON LINDSAY, HARRIS COUNTY JUDGE; EL FRANCO LEE, JIM FONTENO, STEVE RADACK, AND JERRY EVERSOLE, HARRIS COUNTY COMMISSIONERS; AND JOHNNY KLEVENHAGEN, HARRIS COUNTY SHERIFF,

Respondents

v.

LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE' J. PINA, II, PAT REED, AND WESLEY SELLERS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS LAWRENCE R. ALBERTI, OTHER NAMED PLAINTIFFS, AND THE CLASS OF PRESENT AND FUTURE INMATES IN THE JAILS OF HARRIS COUNTY, TEXAS

Respondents Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, and Wesley Sellers, individually and on behalf of all present and future inmates of the Harris County jails, respectfully request that this Court deny the petition for a writ of certiorari filed by Ann Richards, Governor of Texas, the members of the Texas Board of Criminal Justice, and the executive director of the Texas Department of Criminal Justice that seeks review of the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 978 F.2d 893 (5th Cir. 1992). That opinion affirmed the district court's unreported memorandum order of August 7, 1991, attached to the petition for a writ of certiorari as Appendix C. That decision, in turn, had resulted from a remand from the fifth circuit by a ruling reported at 937 F.2d 984 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1994 (1992), which had reviewed the district court's unreported memorandum opinion of September 25, 1989 (attached to the petition as Appendix Y). The district court's liability ruling has resulted in a series of remedial orders which are attached to the petition for a writ of certiorari.

Other significant decisions rendered in this case are reported at 903 F.2d 352 (5th Cir. 1990) (attorney's fees issues), 896 F.2d 927 (5th Cir. 1990) (attorney's fees

issues), 799 F.2d 992 (5th Cir. 1986), 790 F.2d 1220 (5th Cir. 1986), 688 F. Supp. 1210 (S.D. Tex. 1987) (attorney's fees issues), 688 F. Supp. 1176 (S.D. Tex. 1987) (attorney's fees issues), 660 F. Supp. 605 (S.D. Tex. 1987), 610 F. Supp. 138 (S.D. Tex. 1985), 606 F. Supp. 478 (S.D. Tex. 1985), 600 F. Supp. 443 (S.D. Tex. 1984), and 406 F. Supp. 649 (S.D. Tex. 1975).

STATEMENT OF THE CASE

Indifferent to the role of the plaintiffs-respondents (the inmates of the jails) in this litigation, petitioners mischaracterize this lawsuit as simply "an internal dispute between the Texas legislature and the counties of Texas over whether counties should be compensated for housing inmates ready for transfer to the state prison system". Petition for Certiorari at p. 16. If that were really what this case is all about, federal court involvement would indeed be inappropriate (and, of course, the fourth Question Presented by petitioners in the petition for certiorari would be irrelevant).

The truth is that this is not simply some internecine battle over money between two levels of state government. Rather, it is a case about inmates in a severely overcrowded county jail being subjected to conditions of incarceration which everyone concerned concedes contravene the constitution of the United States.

Accordingly, plaintiffs-respondents do not accept the petitioners' assertion that, "The only real dispute in this case has been between the State and County Defendants". Petition for Certiorari at pp. 6-7. The "real dispute" revolves around the fact that Harris County's jails are (and have been) so egregiously overcrowded that the jailers cannot provide for the basic necessities of human existence and the constitutional rights of inmates have been flagrantly violated for many years. The immediate cause of

these intolerable conditions is that the petitioners repeatedly made deliberate decisions (commencing in 1987) to leave certain convicted "state-ready" felons in the Harris County jails, rather than accepting them into the state prison system, knowing that conditions in the jails were "objectively cruel", *Alberti v. Sheriff of Harris County, Texas*, 937 F.2d 984, 999 (5th Cir. 1991), at the time.

Thus, this is a dispute between the inmates of the unconstitutionally overcrowded Harris County jails and the governmental officials (state and local—including the petitioners) who have chosen deliberately to subject them to these intolerable and inhumane conditions. It is not simply, as petitioners suggest, some inter-governmental battle between a state and its counties.[1]

Much of petitioners' "Statement of Facts" is argumentative rather than factual. Accordingly, and in the interests of brevity, plaintiffs-respondents incorporate by reference the factual recitals contained in the fifth circuit's opinions, especially at 937 F.2d at 986-92. These respondents would add only the following.

No one disputes the fact that the Harris County jails are (and throughout the relevant time frame involved in this case, were) egregiously objectively unconstitutional. Indeed, the petitioners' own expert, Mr. Martin testified,

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[1] Indeed, if this case were really only a dispute between the petitioners and the county defendant-respondents, the fourth Question Presented in the petition for certiorari would be irrelevant. The *Wilson v. Seiter* issue relates exclusively to the question whether or not these petitioners are liable to the inmate respondents, not to whether or not they are liable to the county defendants-respondents. There are no "rights" of the county defendants-respondents which are violated (or not transgressed) depending on the mental state of the petitioners toward the inmate respondents.

"[T]hat is the most egregious crowding in a confinement facility that I personally have witnessed, which includes touring [100 to 200] confinement facilities over [an] eighteen, nineteen year period. . . . It is one of the few instances in which I without qualification would render an opinion that it's in violation of the eighth amendment, as I understand the eighth amendment and the correctional law." Tr. Sept. 15, 1989 at pp. 135-137.

Petitioners' counsel, Mr. Ozer, agreed:

Mr. Ozer:	"I viewed the jail conditions, Judge. They are horrible.
The Court:	But are they unconstitutional?
Mr. Ozer:	Are you asking me for my conclusion?
The Court:	I am asking you for your commitment for your client.
Mr. Ozer:	I believe the conditions of confinement in the Harris County jail are unconstitutional."

Tr. Sept. 13, 1989 at 7-8.

The county defendants-respondents concurred, admitting that conditions within the Harris County jails were "beyond constitutionally acceptable limits". County Defendants' Opposition to State Defendants' Petition for Writ of Mandamus or Prohibition at p. 67; County Defendants' Opposition to State Defendants' Application for Stay at pp. 26, 30, 37; County Defendants' Brief filed March 21, 1991 at p. 71.

Thus, it is common ground that conditions in the Harris County jails are (and throughout this litigation were)

objectively unconstitutional. Those conditions are so egregious that they have actually resulted in loss of life. Findings of Fact No. 20, Sept. 25, 1989. That much is not in dispute in this litigation.

It is also established (though this finding is contested by the petitioners) that the objectively unconstitutional condition of the jails is the result of deliberate indifference to the serious needs of inmates by both the petitioners and the county defendants-respondents. Order, Aug. 7, 1991, *aff'd, Alberti v. Sheriff of Harris County, Texas*, 978 F.2d 893 (5th Cir. 1992); *see also, Alberti v. Sheriff of Harris County*, 937 F.2d 984, 999 (5th Cir. 1991) (finding "strong if not compelling evidence of deliberate indifference to the plight of these ready-felons"). Thus, under *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991), both the petitioners and the county defendants-respondents were found to have violated the constitutional rights of inmates in the Harris County jails.

Having found constitutional violations, the court undertook to fashion a remedy. Since the root cause of the admitted unconstitutionality was flagrant overcrowding in the jails, the court simply mandated that a certain number of prisoners be removed from the Harris County facilities and transferred to available empty cells in other counties. The court further directed that the petitioners participate in that *prospective* relief by paying for the costs of using those cells in other counties. It is that order which the petitioners claim violated the Eleventh Amendment and principles of federalism.

In this context, the insubstantiality of the petitioners arguments and the consequent inappropriateness of a grant of certiorari in this case are readily apparent.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S DECISIONS PROPERLY APPLY PRINCIPLES OF FEDERALISM, ABSTENTION, CERTIFICATION, AND ELEVENTH AMENDMENT IMMUNITY

The Fifth Circuit's carefully reasoned decisions in this case are soundly based, consistent with this Court's decisions, correctly deferential to state interests and processes, and appropriately responsive to the admitted substantial constitutional violations confronted by the courts. They therefore should not be subject to further review.

A. The Fifth Circuit Correctly Ruled That The Eleventh Amendment Provides No Bar To A Federal Court Ordering Prospective Relief to Eliminate Currently Existing Unconstitutional Conditions

Petitioners characterize the directive that they pay for the costs of housing prisoners transferred from unconstitutionally overcrowded Harris County jails to available cells in other counties as an order that the state "compensate one of its political subdivisions . . . in violation of the Eleventh Amendment". Petition for Certiorari, Questions Presented No. 2, at p. 17 n. 15. Although the Eleventh Amendment precludes an order requiring a state defendant to use state funds to make reparations for *past* misconduct, state officers are not immune from being required to effectuate *prospective* relief from currently unconstitutional conditions, even if the remedial order entails substantial financial consequences. *Hutto v. Finney*, 437 U.S. 678 (1978); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Will v. Michigan Department of State*

Police, 491 U.S. 58, 71 n. 10 (1989); *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985).

Milliken v. Bradley, is a good example of this principle. In that case, this Court rejected an Eleventh Amendment defense and approved an injunction ordering the state to pay almost $6,000,000 to help defray the cost of desegregating the Detroit school system. Significantly, that case involved a situation, precisely equivalent to the one at bar, in which the state was ordered to share the cost of prospective relief with the local governmental defendant.

Similarly, in *Missouri v. Jenkins*, 495 U.S. 33, 56 n.20 (1990), this Court endorsed the ruling of the district court directing the state to furnish $27,000,000 toward a $37,000,000 capital improvement program decreed as part of a comprehensive school desegregation plan. "The Eleventh Amendment does not bar federal courts from imposing on the States the costs of securing prospective compliance with [an order remedying unconstitutional conditions]," the Court decreed, even when complying entails the expenditure of millions of dollars of state funds. *Id.*

The main flaw with the petitioners' Eleventh Amendment argument results from their mischaracterization of the court's remedial order. The district court did not undertake to "tell a state that it must compensate its counties", Petition for Certiorari at p. 17, n. 15, for damages sustained by that governmental entity; rather he sought to provide *the plaintiffs* prospective relief from the unconstitutional conditions to which they were (and are) being subjected as a result of the petitioners' deliberate decision to leave ID-ready convicted felons confined in Harris County jails, rather than removing them to the state penitentiary. Such an order presents no Eleventh Amendment issue at all.

B. The District Court and the Court of Appeals Adequately and Appropriately Deferred To State Court Rulings on State Law Questions and No Further "Abstention" Was Required In This Case, Especially Since the Law In Question Has Been Superseded

Petitioners claim that the federal courts should have abstained in this case because there was allegedly "real ambiguity" concerning the meaning of certain aspects of state law "*prior to the passage of H.B. 93*". Petition for Certiorari at p. 21 (emphasis added). Whatever force that argument might have had "prior to passage of H.B. 93", enactment of that legislation moots the issue. Certainly certiorari should not be granted to review a lower court decision declining to abstain in a constitutional controversy where the issue sought to be remanded to the state courts is the construction of a law that has since been superseded.

Moreover, in this case the federal courts *did* defer to controlling state court decisions unambiguously construing the allegedly "uncertain" provisions of state law. In *County of Nueces v. Texas Bd. of Corrections*, No. 452,071 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas) and *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas), the state district court had rendered declaratory judgments construing the relevant aspects of Texas law and concluding that petitioners were indeed responsible, under state law, for removing state-ready prisoners promptly from county jails. The federal district court and the court of appeals expressly deferred to those state court rulings.

Admittedly, the state court decisions were being appealed at the time district court's opinion was announced. That circumstance is of no moment. It is well established that a federal court must give controlling effect to a state lower court ruling until that decision is reversed

on appeal. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941); *Rooker v. Fidelity Trust Co.*, 283 U.S. 413, 415 (1923); *Reed v. Allen*, 286 U.S. 191 (1932).

What the district court did here was precisely what the principles of federalism command: it applied state law *as it had then been conclusively construed.* The court did indicate that it would reconsider its rulings if the Texas courts should subsequently reject the existing interpretation of state law. That never occurred.

The federal courts did not venture here into uncharted waters trying to predict how Texas courts would ultimately decide murky questions of state law. Rather, they accepted the state court's pronouncements on the meaning of Texas law as they existed at the time. Moreover, the federal courts' rulings did not interfere with pending state court proceedings in any way. In that context, it is difficult to envision a less intrusive, more deferential (to state judicial processes) approach than the course followed here, other than one which simply abdicates the federal courts' responsibility to remedy acknowledged, undeniable, ongoing constitutional violations.

Petitioners' abstention argument is especially difficult to fathom in view of the district court's *unchallenged* finding that further delay in implementing relief in this case would pose serious "life and death" consequences. Order, March 15, 1991 at p. 1.[2] At the time petitioners claim the federal courts should have "abstained", prisoners were literally dying directly from the effects of intolerable overcrowding in the Harris County jails. Findings of Fact No. 20, Sept. 25, 1989.

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[2] "We are talking here about life and death, and the most fundamental rights of the plaintiff class." Order of March 15, 1991.

"[E]xcessive delay causing significant impairment of constitutional rights is a factor persuading against application of the [abstention] doctrine." *Nissan Motor Corp. in USA v. Harding*, 739 F.2d 1005, 1011 (5th Cir. 1984). In this case, waiting on state court processes, any more substantially than the federal courts actually did here, would have been tantamount to denial of constitutional rights.

Moreover, abstention is proper only if there is a state court forum to which a party can then repair for resolution of the state law issue. There was never a state court lawsuit pending between the plaintiffs (the inmates) and the state defendants premised on state law issues, nor could there be. The inmates do not claim that the state defendants (petitioners) breached a state law duty owed to them (apart from their federal constitutional obligations), so they would be without standing to litigate the state law issues in the state courts. In this context, abstention would be meaningless: there would be no way for plaintiffs-respondents to obtain a state court determination of any state law issue specifically affecting their rights.

Finally, in this case there never was any federal constitutional question the answer to which depended on resolution of unsettled issues of state law. As the court of appeals held that "there is little doubt that both the county and the state [petitioners] knew that conditions of confinement in the county's jails deprived inmates of basic needs. . . . There is no doubt that the relevant state officials knew that ready-felons were being backlogged despite the objectively cruel conditions in the county's jails. Yet the state [petitioners] chose to leave them in the jails." *Alberti v. Sheriff of Harris County, Texas*, 937 F.2d 984, 998-99 (5th Cir. 1992). There is no "uncertain" state law question lurking in those unchallenged finding and they conclusively demonstrate that petitioners are

constitutional tort-feasors. Therefore, there was no occasion to abstain here.

Petitioners have repeatedly lost before their own courts on the very issues they asked the federal courts to "abstain" from deciding. In these circumstances the species of abstention they propose is not *Pullman*, *Burford*, *Younger*, or *Pennzoil* abstention; it is a new genre entirely which can properly be called "certain defeat abstention".

The federal courts were right to defer to decisive determinations of state law matters by the state courts but to refuse to refrain from ordering a remedy for acknowledged, life-threatening unconstitutional conditions while two other parties litigated their ancillary disputes in some other forum in a case in which the plaintiffs-respondents were not, and could not be, parties. Comity and federalism do not require emasculation of the federal constitution, especially where the law sought to be further construed by the state courts has been subsequently supplanted.

C. The Court Should Not Grant Certiorari To Review The Correctness of The Fifth Circuit's Failure To Certify Questions To The Texas Supreme Court Because The Law Sought To Be Clarified Has Been Superseded

In March of 1991, plaintiffs-respondents recommended to the court of appeals that it certify to the Texas Supreme Court two questions concerning interpretation of H.B. 2335 which, *at the time*, possessed currency in this litigation. Plaintiffs' Response to State Defendants' Petition for Writ of Mandamus and/or Prohibition and Other Relief, filed March 13, 1991; *see also* Plaintiffs'-Appellees' Brief, filed March 22, 1991, at pp. 61-68. The fifth circuit declined to pursue this course, concluding that two state lower court

decisions sufficiently eliminated uncertainty about the meaning of state law as it then existed.

Regardless of whether or not certification might have been warranted or preferable in early 1991, subsequent events have rendered this issue entirely academic—and certainly not "certworthy"—at this time. In the first place, the law about which clarification was sought via certification (H.B. 2335) was supplanted by H.B. 93 later in 1991. Thus, whatever may have been the implications of H.B. 2335 on the state's traditional responsibility to remove convicted felons promptly from county jails, H.B. 93 revised that role significantly, as the petitioners essentially concede. No party to the *Alberti* litigation has ever suggested to any court that some question arising under H.B. 93 should be certified to the Texas Supreme Court. Yet it is the regime of H.B. 93—not that of its predecessor, H.B. 2335—with which the lower courts must now deal in fashioning an appropriate remedy in this case.

In short, the simple answer to the certification issue is that the law was changed by the state legislature in ways that obviated any need to seek enlightenment from the Texas courts concerning the meaning of previously existing, but currently superseded, state law.

Moreover, petitioners could have obtained a state appellate court ruling on these questions, had they really wanted the state appellate courts' guidance on these matters, but they *deliberately* chose not to pursue that course. There were two state court cases in which petitioners were involved (*County of Nueces v. Texas Bd. of Corrections*, No. 452,071 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas) and *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas), pending in 1991, in which the district court had rendered declaratory judgments interpreting H.B. 2335. The appeals in those cases were pending before the Texas

Court of Appeals at the time certification was recommended. Rather than pursue those appeals to further explication of Texas law, the petitioners chose to settle those cases and forego appellate court review of the correctness of the trial courts' interpretation of H.B. 2335 (which had been adverse to the petitioners).

Having intentionally abandoned a readily available state court forum to obtain the interpretative ruling it sought by certification, petitioners relinquished any basis for complaining of the federal court's refusal to seek enlightenment from the state court system.

Nothing in the concepts of comity and federalism compels a federal court to put remedy of serious constitutional violations on hold while the parties seek clarification from the state courts of the meaning of a *superseded* state court statute, especially where the party seeking that illumination had the opportunity to obtain it from the state courts itself and chose deliberately to forego that elucidation. In these circumstances certification would not enhance resolution of this controversy, it would simply forestall it.

II. THERE IS NO IRRECONCILABLE CONFLICT BETWEEN THE FIFTH CIRCUIT'S RULING IN *ALBERTI* AND THE SIXTH CIRCUIT'S HOLDING IN *KELLEY V. METROPOLITAN BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE*, 836 F.2D 986 (6TH CIR. 1987)

Petitioners maintain that there is a fundamental conflict between the *Alberti* decision and the opinion of the sixth circuit in *Kelley v. Metropolitan Board of Education*, 836 F.2d 986 (6th Cir. 1987), compelling a grant of certiorari to resolve. No such disharmony exists.

Kelley involved a tagend to a thirty year old school desegregation case in which the school board sought reimbursement from the state for the expenses it had incurred correcting the effects of past—but long since eliminated—*de jure* segregation. The state officials were not "currently doing anything wrong", 836 F.2d at 990, and the original plaintiffs (the school children) were not even parties to the appeal.

The crucial aspect of *Kelley*, which differentiates it decisively from *Alberti*, is the fact that in *Kelley*, there was no *ongoing* constitutional violation to which the state was a party. "Mandatory segregation by law . . . has long since ceased." 836 F.2d at 1000. The state defendants "are not threatening to enforce any unconstitutional act". 836 F.2d at 990.

By contrast, *Alberti* involves an ongoing constitutional violation. The petitioners were not being directed to correct the "lingering consequences" of past unlawful conduct, 836 F.2d at 1000, but to participate in the elimination of *current* constitutional transgressions. Moreover, unlike the state defendants in *Kelley*, the petitioners here are currently participants in continuing infractions: it is the petitioners' *present* policy of refusing to accept state-ready inmates timely into the state prison system which is causing the backlog or prisoners in the jails which, in turn, produces the unacceptable and unconstitutional conditions of incarceration there.

Even *Kelley* acknowledges that, "there is nothing improper about judges directing wrongdoers to pay for the righting of their wrongs." 836 F.2d at 997-98. That is all the courts below have done here. Nothing in *Kelley* suggests that "current constitutional violator[s]", *Alberti*, 937 F.2d at 1001, cannot be required to participate in the remedy designed to eliminate prospectively *ongoing*

constitutional abuses—even if the transgressor is a state official.

In this regard, *Alberti* is controlled by *Papasan v. Allain*, 478 U.S. 265 (1986). In that case, the Court explained that the Eleventh Amendment does not bar relief in cases where the order "ends the violation of federal law as opposed to cases in which that relief is intended indirectly . . . to meet third-party interests such as compensation." 478 U.S. at 278. Eliminating present constitutional violations was, of course, what this order was all about.

Moreover, whatever force *Kelley* might otherwise have possessed was undermined considerably by this Court's ruling in *Missouri v. Jenkins*, 495 U.S. 33, 56 n.20 (1990). In that case, the Court sanctioned the district court's order directing the state to fund part of the remedy decreed to eradicate the effects of past discrimination. If there is a "conflict", it is between *Jenkins* and *Kelley* (which differ concerning the propriety of directing a state to participate financially in a remedy intended to rectify the effects of past illegal conduct in the face of a claim of Eleventh Amendment immunity). *Jenkins* renders *Kelley*'s viability suspect, and certainly deprives it of sufficient credence to justify a grant of certiorari to resolve an asserted (but really non-existent) conflict between the sixth circuit's approach, as embodied in *Kelley*, and the fifth circuit's view on Eleventh Amendment issues, as explicated in *Alberti*.

The supposed conflict is more imagined than real, and it is really inconsequential at all events. It certainly does not justify a grant of certiorari to correct.

III. THE FIFTH CIRCUIT APPLIED THE CORRECT LEGAL STANDARD IN CONCLUDING THAT THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT PETITIONERS ACTED WITH DELIBERATE INDIFFERENCE TO THE SERIOUS NEEDS OF THE INMATE PLAINTIFFS-RESPONDENTS

Petitioners maintain that they cannot be found to have acted with "deliberate indifference" to the serious needs of inmates in the Harris County jails, sufficiently to satisfy the "subjective component" of a constitutional violation, *Wilson v. Seiter*, ___ U.S. ___, ___, 111 S.Ct. 2321, 2324 (1991); *Hudson v. McMillian*, ___ U.S. ___, ___, 112 S.Ct. 995, 1006 (1992), because the appellate courts of Texas had not unequivocally condemned their actions prior to plaintiffs' lawsuit having been filed. "Until State courts had authoritatively construed [petitioners'] State-law duties," petitioners argue, Petition for Certiorari at p. 28, they cannot be found to possess the culpable mental state required by *Seiter*.

The argument is so flawed certiorari should not be granted to consider it. In the first place, it is entirely inaccurate to claim that the state courts had not "authoritatively construed" the petitioners' state-law duties as of the time the plaintiff-respondents filed their lawsuit against these defendants. On the contrary, *two* state courts decisions had construed the relevant provisions of state law (adversely to petitioners). See *County of Nueces v. Texas Bd. of Corrections*, No. 452,071 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas); *Harris County v. State of Texas*, No. 475,468 (Dist. Ct. of Travis Co., 126th Jud. Dist. of Texas). *See also, Markham v. Tarrant County Texas Commissioner's Court*, 779 S.W.2d 872, 874 (Tex. App.—Fort Worth 1989, writ denied). Admittedly, those decisions were district court opinions which were being

appealed, but it is well settled that an appeal of a state court judgment "does not—unless and until reversed—detract from its decisiveness and finality". *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1949); *see also Rooker v. Fidelity Trust Co.*, 283 U.S. 413, 415 (1923) ("If the [state trial court] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication"); *Reed v. Allen*, 286 U.S. 191 (1932); *Nixon v. Richey*, 513 F.2d 430, 438 n.75 (D.C. Cir. 1975); *Petrella v. Siegel*, 843 F.2d 77, 80 (2d Cir. 1986).

Thus, the premise of petitioners' argument is demonstrably non-existent. There were two definitive, authoritative judicial decisions construing their state law duty at the time the district court made its "deliberate indifference" finding. Petitioners simply chose to ignore those rulings.

Further, months before the plaintiffs-respondents filed suit against the state defendants the federal district court had ruled twice (in litigation between the petitioners and the county defendants-respondents) that the petitioners bore partial responsibility for the objectively unconstitutional conditions in the Harris County jails. *See*, Order, May 12, 1989; Order, July 11, 1989. Neither of those rulings had been stayed, nor had petitioners sought § 1292(b) interlocutory appellate review. Thus, by the time plaintiffs-respondents filed suit against petitioners, there was nothing "uncertain" about the duty of petitioners to refrain from subjecting prisoners in the Harris County jails to objectively unconstitutional conditions there. Petitioners chose—deliberately—to ignore those adjudicated constitutional responsibilities.

Moreover, these rulings were consistent with the seven year old (at that time) precedent from the fifth circuit that state prison officials cannot avoid responsibility for providing constitutional housing for inmates by leaving them in unconstitutionally overcrowded local jails. *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *see also Benjamin v. Malcolm*, 803 F.2d 46, 51 (2d Cir. 1986); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984).

Pie-in-the-sky hopes of appellate reversal do not undermine the deliberateness of the defendants' indifference to the serious needs of inmates pending an ultimately unsuccessful appeal, especially given the unbroken string of rejections of its argument petitioners had experienced. To this date (and as of 1989) petitioners have never persuaded a single court—state or federal—of their asserted non-responsibility for state-ready inmates housed in unconstitutionally overcrowded local county jails as a result of their deliberate decision intentionally to leave them there. To suggest in this context that their duty to refrain from condemning inmates to serve their sentences in unconstitutional local jails was "uncertain" is virtually incomprehensible.

At all events, petitioners *knew* when they adopted their Scheduled Admissions Policy and when they promulgated their "allocation" of prison admissions pursuant to TEX. REV. CIV. STAT. ANN. ART. 6166a (Vernon Supp. 1991), that the effect of those decisions—indeed, the objective thereof—would be to leave a significant number of state-ready convicted felons in the Harris County jails. That was a *deliberate* decision. State officials chose to condemn a portion of the state-wide prison-ready population to serve a portion (or in many cases, all) of their state sentences in the Harris County jails. To urge, as petitioners do here, that they could ignore the consequences of those decisions because they were "uncertain" of their obligation to avoid exacerbating unconstitutional overcrowding in the county's

jails is to demonstrate the very indifference the constitution forbids.

Regardless, the decisions of this Court establish clearly that state officials cannot avoid their constitutional duties by delegating their responsibilities to others. *West v. Atkins*, 487 U.S. 42, 56 (1989) ("Contracting out [prisoner care] does not relieve the State of its constitutional duty to provide adequate [care] to those in its custody"). Prison officials have a non-delegable constitutional obligation to take reasonable steps to avoid subjecting convicted felons and other prisoners for whom they are ultimately responsible to clearly unconstitutional conditions of confinement. *Washington v. Harper*, 494 U.S. 210, 225 (1990); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Youngberg v. Romero*, 457 U.S. 307 (1982). That petitioners failed to do so here is undeniable. To excuse that dereliction on grounds of that no state court had definitively ruled that the petitioners were required to assume responsibility for the constitutional consequences of their policy choices would transform the "deliberate indifference" standard into an open invitation to avoid constitutional duty.

Owen v. City of Independence, Mo., 445 U.S. 622 (1980), establishes that ignorance (or uncertainty) of the law is not a defense available to governmental defendants sued under § 1983 in their official capacities. Section 1983 was intended "to serve as a deterrent against future constitutional violations . . . [and t]he knowledge that a [governmental defendant] will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651-52.

If the duty was "uncertain", it was the responsibility of the petitioners to err on the side of protecting constitutional rights. Their proposed new rule—requiring a definitive opinion from a state court of last resort as a prerequisite to a finding of "deliberate indifference"—would stand that principle on its head.

Understandably, no court has ever adopted (or even hinted at the acceptability of) such a rule. Nothing in *Seiter*, *Hudson*, the Eleventh Amendment, *Pennhurst*, the Eighth Amendment, any other part of the constitution, or any other decision of this Court would require, or even allow, that result. Certiorari should not be granted to consider such a novel and insupportable extension of existing law.

IV. THE COURT OF APPEALS JUDGMENT CAN BE AFFIRMED ON ALTERNATE GROUNDS BASED ON THE "DUE PROCESS" STANDARDS APPLICABLE TO PRE-TRIAL DETAINEES (RATHER THAN THE EIGHTH AMENDMENT "DELIBERATE INDIFFERENCE" INQUIRY CONTROLLING DETERMINATION OF CONSTITUTIONAL CLAIMS OF CONVICTED INMATES)

Plaintiffs-respondents have consistently maintained, and continue to insist, that *Wilson v. Seiter*'s "deliberate indifference" standard is not the proper measure of constitutional evaluation in this case because the rights of pre-trial detainees incarcerated in the jails are implicated, too. Those inmates' rights are controlled by the Due Process Clause, rather than the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520 (1979).

Just last term this Court recognized the difference in standards between claims arising under the eighth amendment (governing the rights of convicted prisoners)

and those involving the treatment of pretrial detainees (controlled by Due Process Clause principles). *Collins v. City of Harker Heights, Texas*, ___ U.S. ___, ___, 112 S.Ct. 1061, 1069-70 (1992) ("We have held, for example, that *apart from the protection against cruel and unusual punishment provided by the Eighth Amendment*, cf. *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L.Ed.2d 522 (1978), the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, see *Bell v. Wolfish*, 441 U.S. 520, 535, n.16, 545, 99 S. Ct. 1861, 1872, n.16, 1877, 60 L.Ed.2d 447 (1979)"). *Alberti* is a mixed prison/jail case, since both pretrial detainees and convicted felons awaiting transfer to the state prison are incarcerated there.

With regard to the pretrial detainees, who are being subjected to objectively unconstitutional conditions of incarceration in the Harris County jails, issues of "deliberate indifference" are largely beside the point. Moreover, the court of appeals never reached this issue, since in affirmed the petitioners' responsibility even under the more stringent standards of the eighth amendment.

Nevertheless, these circumstances further counsel against a grant of certiorari in this case, since even if the Court were to agree with petitioners' position on the "deliberate indifference" issue, there would still be an adequate basis for affirming the court of appeals' judgment on the basis of Due Process principles applicable to pretrial detainees. Admittedly, the court of appeals has never addressed this aspect of the case, despite its having been repeatedly urged by plaintiffs'-respondents, so a reversal of the court below would not finally resolve this dispute, but only lead to a remand to the court of appeals for consideration of the role of the Due Process Clause and the rights of pretrial detainees in this case.

The procedural posture of this case, therefore, renders it an inappropriate vehicle for explication of the questions presented by petitioner. Should the Court grant certiorari, however, it will have to consider whether the Due Process Clause or the Eighth Amendment controls the inquiry in cases of this sort.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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92-1648
No. ____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1992

Ann Richards, Governor of Texas; Carol S. Vance, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Clarence N. Stevenson, Allan B. Polunsky, R. H. Duncan, Sr., Gilberto Hinojosa, John R. Ward, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

THE "HARD QUESTION" OF STATE DEFENDANTS' LIABILITY WAS "*EXCLUSIVELY*" A STATE LAW ISSUE WHICH COULD ONLY BE AUTHORITATIVELY DECIDED BY STATE COURTS AND NOT RESOLVED ON A "CONTINGENT" AND "TENTATIVE" BASIS BY FEDERAL COURTS

Despite efforts by both Plaintiffs and County Defendants to confuse the central issue in this case, the gravamen of this petition remains simply *whether State Defendants are liable for conditions of confinement at a local jail operated and managed exclusively by county officials*. State Defendants maintain, as did the Fifth Circuit, that this issue presented a "hard question" of "*exclusively*" state law. Appendix to Petition for Writ of Certiorari [Pet. App.] C 15. State Defendants also maintain that the resolution of this issue on a "tentative" and "contingent" basis, Pet. App. C 30, dependent upon the outcome of state court litigation was inappropriate under principles of federalism, particularly in light of the fact that the state district court decision relied upon by federal courts in making their decision has subsequently been vacated pursuant to settlement.

The fact that the state law basis of the Fifth Circuit's decision has evaporated bears emphasis in light of Plaintiffs' contention that the case is moot. State Defendants have, pursuant to federal court order and *without state legislative authorization*, directly reimbursed a political subdivision of the State of Texas for $12,649,874.25. Petition at 8. Subsequent orders (not the subject of this petition) pose additional financial liability for remedial plans and "fines" or "sanctions." Petition at 8-9; Pet. App. E, G, H. It is hard to seriously contend, given the almost unlimited financial liability imposed on State Defendants by federal courts in this case, that the case is moot.

Nor are Petitioners' contentions moot because there are no longer any state court suits to abstain to. Lower federal courts, ignoring basic principles of federalism, have forced state officials to transfer millions of dollars to a local governmental subdivision to meet the needs of jail inmates, when those officials' responsibility for those inmates was unclear at best. This violation of the structure Our Federalism should not go unremedied; the money should be returned to the state treasury.[1] Moreover, as Petitioners have consistently urged in the alternative in the Court of Appeals below, (and so urge here) if there remains any uncertainty about whether Petitioners are required, under the terms of the state court settlements, to do more than they are currently doing to alleviate the conditions of inmates, the question of Petitioners' responsibilities under those settlements entered pursuant to current state law should be certified to the Texas Supreme Court. See Memorandum Brief of State Appellants (in appeal after remand) at 2-3 (adopting all arguments raised in appeal before remand); Brief of State Appellants (in first appeal before remand) at 55-56; Memorandum Reply Brief of State Appellants (in appeal after remand) at 8 n. 10; and letter of August 26, 1992 (filed in appeal after remand), citing supplemental authority in support of certification. (Copies of relevant portions of Briefs and letter lodged with Clerk of the Court.)[2]

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[1] This would not mean that the Plaintiff inmates would be denied a remedy for the conditions in the jail. There is nothing in this case to suggest that the County Respondents lack or have ever lacked the financial means to alleviate conditions in the jail.

[2] The assertions of the Plaintiff-Inmate Respondents at 13 of their Brief in Opposition and the County Respondents' at 24 of theirs that Petitioners did not raise the issue of certification below in the appeal after remand are thus simply false. It seems that Respondents, who are so free with charges of misrepresentation, would take greater pains to be accurate themselves. In this connection, Petitioners strongly object to the strategy of the County Respondents in particular to characterize every disagreement Petitioners have with them as a misrepresentation. See County Brief in Opposition at 27-30. Petitioners dispute all charges that they have misrepresented the facts or the law or that they have cited to materials that are not properly before this Court or that this Court may not take judicial notice of.

On the other hand, the state court decisions which constituted the sole basis for State Defendants liability in the district court and Fifth Circuit -- and which Plaintiffs and County Defendants have so persistently and recklessly advanced to contest this Petition -- *are* moot, having been vacated pursuant to H.B. 93 and settlement agreements.[3]

County Defendants try to circumvent this issue by relying on federal decisions ruling that the state must accept inmates from a local jail facility. However, the cases relied upon by the County[4] dealt with factual situations in which federal courts ordered state inmates to be received by the state facilities pursuant to state law. Here in contrast, it is undisputed that State Defendants had a duty "only" to accept inmates pursuant to a statutory allocation formula. TEX. GOV'T CODE ANN. § 499.121(a) (Vernon Supp. 1993), Pet. App. AA 1. In this regard, the lower federal courts repeatedly enjoined State Defendants to maintain that allocation formula. Pet. App. U 8, V 3, W 3-4. Indeed, the remedy imposed herein was not an injunction that the state should accept state-sentenced inmates into state correctional facilities. Rather, here state officials were simply ordered to compensate county officials for state inmates kept in custody of the Harris County sheriff. But state law is emphatically explicit that the counties were financially responsible for all prisoners in their jails:

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[3] The remarks the Plaintiffs and County Defendants cite from *Tarrant County Commissioners Court v. Markham*, 779 S.W.2d 872, 874-75 (Tex. App. - Fort Worth 1989, writ denied) do not constitute any kind of decision on these issues. The issue in that case was Markham's standing to bring a class action. The remarks cited are consequently *dicta* and were especially gratuitous (and unfair) given that Petitioners at that time were not parties to that case and had had no opportunity to present their side of the story.

[4] See County Respondents' Brief in Opposition at 6 n.11, citing *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied sub nom., Cuomo v. Koehler*, 480 U.S. 910 (1987); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984).

> "[A] county is liable for all expenses incurred in the safekeeping of prisoners confined in county jails or kept under guard by the county.

TEX. CODE CRIM. PROC. ANN. art. 104.002 (Vernon Supp. 1993); Op. Atty. Gen. JM-743 (1987) (counties, not state are liable for medical expenses of parole violator in state's legal custody but confined in county jail"), Pet. App. BB; Op. Atty. Gen. JM-730 (1987) (counties, not state, liable for medical expenses of state inmates confined in county jail on bench warrant), Pet. App. CC. See also Petition at 10-11. And the question of financial liability was "*exclusively*" a question of state law which State Defendants maintain federal courts did not have authority to decide or, alternatively, should have resolved by deferring to ongoing state court proceedings under the abstention doctrine or certified to the Texas supreme court. Petition at 15-26.

Nor can Plaintiffs or County Defendants reasonably rely on the Fifth Circuit's decision in *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), a Mississippi case decided under Mississippi, not Texas law. This is especially the case when the only federal case involving the liability under *state law* of Texas state officials for unconstitutional conditions in a local jail explicitly held that, in the absence of supervisory responsibility over local jails, state officials could not be liable for conditions in those jails. *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986). (Texas state officials who set standards for and inspect local jails held not responsible for conditions in local jail).[5] See also *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976).

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[5] This is especially the case when the state officials involved in *Bush* had the legal authority to transfer inmates to other county jails. TEX. GOV'T CODE ANN. § 511.012(b) (Vernon 1990). Here in contrast, state prison officials had no such authority to transfer prisoners to other county jails or even involvement in such transfers prior to the passage of H.B. 93. (TEX. GEN. & SPECIAL LAWS 1991, 2d Called Sess., Ch. 10, pp. 180-226 [eff. August 29, 1991]).

Plaintiffs and County Defendants attempt to justify the rulings below by reliance on *Milliken v. Bradley*, 433 U.S. 267 (1977). First of all, this strategy begs the question: Can a federal court even resolve a state law financial dispute between two state entities when the issue of liability rested "*exclusively*" on "hard questions" of state law? In this regard, it is hard to contend, as the Plaintiffs and County Defendants do, that state officials are "current constitutional violators" when their liability is unsettled or at best "tentative" and "contingent" upon the determination by state courts of what state law means. For this reason, the attempt of the County and Plaintiffs (and the Court of Appeals) to distinguish *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee v. State of Tennessee*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), likewise rests on question-begging: one cannot distinguish *Kelley* by assuming that the State Defendants are "current constitutional violators," when that assumption can be made only by first deciding a state-law dispute that *Kelley* says federal courts should stay out of.

Second, "[t]he order to pay is ancillary only to itself, in other words, and therefore it goes beyond *Milliken*." *Kelley*, 836 F.2d at 992. Here the "relief" ran *exclusively* to County Defendants[6] and was not incidental to any injunctive relief State Defendants owed to the Plaintiffs class. State Defendants have never been required to take any significant action (above what they were already doing) other then pay the County money (directly or indirectly) to offset the cost of actions it was ordered to undertake. This is in contrast to *Milliken*, where, as the court in *Kelley* pointed out, "the payment of money was not perceived to be all that was required of the State Defendants . . ." *Kelley*, 836 F.2d at 991, and *see id.*, 836 F.2d at 991-992.

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[6] The *Alberti* court had explicitly found that "State Defendants are liable to County Defendants on County Defendants' Third-Party Complaint." Pet. App. Y 33.

Third, the vitality of the *Milliken* decision has been seriously questioned in light of the Supreme Court's ruling in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984) as the Sixth Circuit indicated in *Kelley*, 836 F.2d at 992. In fact, Justice Powell in his concurring opinion in *Milliken* stressed the "uniqueness" of the decision "and the consequent limited precedential effect of much of the Court's Opinion." *Milliken*, 433 U.S. at 292 (J. Powell, concurring); *see Kelley*, 836 F.2d at 992.[7]

Plaintiffs and County Defendants also seek to bolster the validity of the district court and Fifth Circuit's decision by citation to diversity cases[8] holding that state law can be enforced during the pendency of an appeal. However, those cases are easily distinguishable on two grounds. First, the state court judgments relied on in this case have been vacated and are of no authoritative value whatsoever. Pet. App. EE and FF.[9] Secondly, it is unlikely that such diversity cases apply at all in the context of the suit against state officials for injunctive relief given this Court's admonition that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court

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[7] *Missouri v. Jenkins*, 495 U.S. 33 (1990), does not alter this reasoning. That case stands for the proposition that when a state law stands as an impediment to a local governmental entity's obligations under a federal consent decree, a federal court may, by injunctive decree, override state law. *Id.* at 57. It does not say that a federal court may order a state governmental entity to reimburse a political subdivision of the state as part of its remedy for a constitutional violation.

[8] See Brief in Opposition of County Respondents at 22 n.57 and Brief in Opposition of Plaintiff-Inmate Respondents at 18, citing *Huron Holding Corp. v. Lincoln Mine Operating Co.* 312 U.S. 183, 189 (1949); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923); and *Fidelity St. Life Ins. Co. v. First Nat. Bank & Trust*, 510 F.2d 272, 273 (5th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975).

[9] The state district court's letter opinion, which the Plaintiffs, the County and the Fifth Circuit have relied on heavily, explicitly stated that it did not constitute findings of fact and conclusions of law and was not published. Thus, under Texas law, it had no authoritative value even before the judgment that came after it was vacated. *See Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 216 (Tex. App. - Houston [1st Dist.] 1986, no writ).

instructs state officials on how to conform their conduct to state law." *Pennhurst,* 465 U.S. at 106. Diversity cases involving private parties simply do not raise the profound questions of Eleventh Amendment immunity presented by this case.

Finally, neither the Plaintiffs or County Defendants even ventured near the logical anomaly posed by this case in light of this Court's decision in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991): How can state officials be held intentionally liable under the standards of *Seiter* when their underlying state law duty was not clearly established and presented a "hard question" the resolution of which was "tentative" and "contingent" upon the outcome of state court litigation? At the very least, State Defendants should be able to stand on their defense in federal court that they have no duty to remedy local jail conditions until the "hard question" of "***exclusively***" state law is authoritatively resolved by state courts.[10] Petition at 26-29.

CONCLUSION

For these reasons, Petitioners request that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[10] Even if this Court should adopt the due process standard which Plaintiff Respondents advance, Brief in Opposition at 21-23, and which Petitioners maintain does not apply, State Defendants simply have no responsibility under state law for pretrial detainees. Accordingly, State Defendants could not logically be held liable for unconstitutional conditions affecting those inmates.

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In The

Supreme Court of the United States

October Term, 1992

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Petitioners,

v.

John Landaus, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents,

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, José J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE FOR THE STATES OF LOUISIANA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, IDAHO, INDIANA, MISSISSIPPI, MISSOURI, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, WEST VIRGINIA, AND WYOMING, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY ANN RICHARDS, GOVERNOR OF TEXAS AND ALL OTHER PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The Amici are all States. The various Attorneys General, who have joined in this Brief Amicus Curiae, provide legal representation of their respective States and state officials. The particular legal questions presented in the Petition for Writ of Certiorari to This Court posit significant, unanswered questions of federalism; the Tenth and Eleventh Amendments; abstention; liability for unconstitutional conduct; and the scope and nature of remedial injunctive relief in state prisons and local jail conditions of confinement suits. The answers to the questions presented will have a nationwide impact on all litigation requesting as well as imposing remedial injunctive relief on state officials for alleged unconstitutional conditions of confinement in local jails and the authority of lower federal courts to adjudicate matters of governmental structure and organization and of fiscal and public policy within the Several States.

The resolution of the questions presented in the Petition for Writ of Certiorari involve questions of nationwide importance which will directly impact the structure and organization and fiscal and public policy choices within the Several States. The Amici States urge This Court to grant a Writ of Certiorari in this case and set the matter for argument before This Court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In the instant case, the Fifth Circuit violated the principles of federalism and Article III of the Constitution

when it served as arbitrator of a dispute between the State of Texas and its local governmental entity – Harris County. The Fifth Circuit violated the Eleventh Amendment when it determined how the State of Texas should function under the laws of the State of Texas. The failure of the Fifth Circuit to abstain from answering unsettled questions of Texas state law violates the principles of "Our Federalism" contained in the Tenth and Eleventh Amendments. The imposition of liability on Texas state officials for violations of the Cruel and Unusual Punishment Clause of the Eighth Amendment by Harris County officials over whom the Texas state officials had no authority or control under state law, violates This Court's standard of culpability set out in *Wilson v. Seiter*, ___U.S. ___, 111 S.Ct. 2321 (1991) and the requirement of causal connexity under 42 U.S.C. §1983.

Amici do not feel that the federal courts can sweep away the substance of state law, settled or unsettled, nor create state law on the one hand, while on the other hand claiming to follow state law in finding a federal constitutional violation. In the instant case the Fifth circuit swept away Texas state law in regard to imposing a remedy; created new Texas state law in terms of determining the identity of constitutional violators; and then claimed it relied on Texas state law in finding a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. Amici asserts that, in this regard, the opinion of the Fifth Circuit was incorrect. This Court should correct the errors committed by the Fifth Circuit so that these errors will not be repeated in the Fifth or any other Circuit. Clear guidance is needed on the issues raised in the Petition for Writ of Certiorari.

The questions of law presented for review need to be resolved by This Court in order that a uniform application will occur in the lower federal courts. These questions go to the very heart of our federal system of government and the dignity of the Several States. The Amici States do not feel that federal courts have the constitutional authority to restructure the fiscal and structural relationship between a State and its local governmental entities. Nor does a federal court have the authority or expertise to dictate to a State the public policy within that State. While federal courts clearly have the authority to determine if a provision of the Constitution has been violated, they do not possess the authority to impose liability on state officials for acts which are the responsibility of local officials under state law. The opinion of the Fifth Circuit in the instant case does this. This is of nationwide interest and directly impacts almost all so-called institutional reform litigation decided, pending or that may be filed in federal court.

The opinion of the Fifth Circuit violates provisions of the Constitution as well as prior opinions of This Court. It also creates conflict among the circuits. The issues raised in the Petition for Writ of Certiorari affect the jurisdiction of federal courts, our federal system of government, and every State. Therefore, there exist special and important reasons for granting the writ.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE IRRECONCILABLE CONFLICTS BETWEEN THE CIRCUITS OVER (A) THE ROLE OF FEDERAL COURTS IN DECIDING DISPUTES BETWEEN LEVELS OF GOVERNMENT WITHIN THE SEVERAL STATES AND (B) THE SCOPE OF THE TENTH AND ELEVENTH AMENDMENTS.

Amici agree with the reasons for granting the writ asserted in the Petition.[1] These will not be re-asserted here. Amici urge in addition the reasons set out below.

In the instant case, the Fifth Circuit interjected itself into the center of a political dispute between the Legislature of Texas and the counties of Texas over which political entities within Texas should bear the costs associated with housing convicted felons.[2] The Fifth Circuit, in its opinion, resolved this political dispute to the advantage of Harris County. The federal court's authority to determine the existence of an Eighth Amendment violation exists; however, the Fifth Circuit had no authority to

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[1] See: Petition for Writ of Certiorari pp. 15-20

[2] The procedural history and facts of the instant case are outlined in the Petition for Writ of Certiorari at pp. 6-15 and will not be repeated here. It is, however, important to note that Harris County officials, who were the original defendants in the District Court, brought the Texas state officials into federal court on a Third Party Complaint. The plaintiff inmate class did not sue the Texas state officials in their original complaint in the District Court. Id. pp. 6.

resolve the dispute between the State of Texas and its local governmental entities.

The Constitution does not dictate to the States the type of governmental structure which must be established by a State. This includes the relationship with a state's own local governmental entities.[3]

Federal courts are simply not granted the authority under Article III of the Constitution "to adjudicate an internal dispute between a local governmental entity and the very state that created it." *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee*, 836 F.2d 986, 998 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), *See also: Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Since a local entity is a creation of a State, the local entity lacks standing to sue its creator State in federal court. A State cannot sue itself in federal court.[4]

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[3] The Constitution only requires that the States have a republican form of government. Neither Congress nor the federal courts can dictate to the Several States how to organize their internal governmental structures, nor can they define the parameters of the relationship between a state and its local governmental entities. See: *Coyle v. Smith*, 221 U.S. 559 (1911). The Tenth Amendment reserves to the Several States the authority to structure themselves. See: *Coyle v. Smith*, 221 U.S. 559 (1911) and *Presley v. Etowah County Commissioners*, ___U.S.___, 112 S.Ct. 820, 832 (1992)

[4] See: *Coleman v. Miller*, 307 U.S. 433, 441 (1939); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Town of Ball v. Rapides Parish Police Jury*, 756 F.2d 1049, 1051 N.1 (5th Cir. 1984) (and cases cited therein).

How a State organizes and structures itself is guaranteed to the Several States in the Tenth Amendment. Since a governmental entity's ability to organize and structure itself is an act of sovereign authority of that entity, a federal court is prohibited from adjudicating a dispute between a State and its local governmental entities. See: *Presley v Etowah County Commissioners*, ___U.S.___, 112 S.Ct. 820, 832 (1992).[5]

This case involves the fiscal and taxing policies, public safety and local initiatives in regard to the criminal justice system in Texas. It is clear that a finding of liability and the issuing of injunctive relief did not require that Texas state officials be brought into the lower court.[6]

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[5] Federal courts are prohibited by the Eleventh Amendment from instructing state officials on how to comply with state law because that would conflict directly with the principles of federalism that underlie the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman*, 465 U.S 89, 106 (1984). Allowing a federal court to dictate a State's relationship with its local governmental entities would cause an even greater conflict with the principles of federalism that underlie the Eleventh Amendment.

[6] Officials of the State of Texas were brought into this suit by the county that it created in order to protect the fiscal interest of Harris County at the expense of the State of Texas. See: footnote 2, supra.

The officials of the State of Texas were sued by Harris County in order to seek prospective injunctive compensation against them. This type of suit is clearly a suit against the Texas state officials in their official or representative capacities. See: *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 N. 10 (1989). The Harris County officials, therefore, third partied the State of Texas into this suit in federal court. *See also: Hafer v. Melo*, ___U.S.___, 112 S.Ct. 358, 361-362 (1991) and *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985).

Relief could have been obtained from the Harris County officials, who under Texas state law, were the physical custodians of the plaintiff inmate class. The issuance of injunctive relief, which ordered the State of Texas to pay Harris County, clearly interfered with the governmental structure in Texas.

That portion of the injunction was based solely on the Fifth Circuit's interpretation of Texas state law and was not necessary in order to preserve a federal right. This Court has determined that federal courts should not interfere in the rightful independence of state government in the absence of vindicating a federally protected right. See: *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943). In this case, the Fifth Circuit interfered in the fiscal relationship between the Legislature of Texas and the government of Harris County. The remedy could have been obtained solely from Harris County, leaving it to Harris county to seek redress of its fiscal problem with the Texas state legislature or in a Texas state court.

The Fifth Circuit ruling in the instant case and the case of *Benjamin v. Malcom*, 803 F.2d 46 (2nd Cir. 1986), conflict directly with the holdings of This Court in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) and the case of *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee*, 836 F.2d 986 (6th Cir. 1987) *cert. denied* 487 U.S. 1206 (1988). There exists a conflict among the Circuits and a conflict with an opinion of This Court which should be resolved through the granting of this writ.

The Fifth Circuit in its opinion resolved a dispute between Harris County and the State of Texas. See: *Alberti v. Sheriff of Harris County*, 937 F.2d 984, 993-998 (5th Cir. 1991), *cert. denied sub nom, Richards v. Lindsay*, ___U.S.___, 112 S.Ct. 1994 (1992). This violates the Tenth Amendment and Eleventh Amendment of the Constitution, and causes a conflict among the Circuit Courts. The resolution of this issue by This Court is of great importance to every State and local government in this country. For these reasons the writ should be granted.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE LOWER COURT'S CLEARLY ERRONEOUS AND ILL-REASONED RULING ON ABSTENTION

Amici agree with the Petitioner's reasons for granting the writ on the issue of abstention.[7] These reasons will not be re-asserted here. Amici assert that whether the doctrine is abstention, Article III jurisdiction, or Our Federalism under the Tenth or Eleventh Amendment, the Fifth Circuit, like all federal courts, neither has the authority nor background to adjudicate questions of state law.

It is clear in this case that the state law issue of whether the State of Texas owed money to Harris County for housing transfer-eligible inmates was an unsettled question of Texas state law.[8]

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[7] See: Petition for Writ of Certiorari pp. 20-26.

[8] See: Petition for Writ of Certiorari pp. 10-15.

Article III of the Constitution permits federal courts to adjudicate only certain claims; determining questions of state law is not one of the type of claims listed in Article III.[9]

The Tenth Amendment leaves to the Several States the sole authority to adjudicate such state law claims in their state courts. The Eleventh Amendment prohibits federal courts from adjudicating issues of state law solely on state law grounds when state officials are a party to the suit. See: *Pennhurst State School & Hospital v. Halderman,* 465 U.S. at 106.

It is clear that the Fifth Circuit should have "abstained" from adjudicating the unsettled question of Texas State law, stayed the proceedings in federal court on that issue and certified the question to the state court system in Texas. See: *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 9-22 (1987). Additionally, since the issue at stake is purely a matter of state law, and the federal question could have been resolved without answering the state law question, the state law issue should have been dismissed along with the state defendants. See: *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-820 (1976); *New Orleans Public Service, Inc. v. Counsel of City of New Orleans,* 491 U.S. 350, 360-362 (1989) and *Mississippi*

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[9] This case is not based on diversity but rather on a federal claim. While matters involving state law might arise in a diversity case, only the constitutionality of a state law can be considered as arising under a federal claim. Here the issue was not the constitutionality of the state law in question but rather an actual adjudication of what that state law means.

Power & Light Co. v. Mississippi, ex rel Moore, 487 U.S. 354, 108 S.Ct. 2428 (1988).

The reasons why federal courts should not adjudicate state law claims are grounded both in the Constitution and practicality. This Court has pointed out that federal judges are not necessarily schooled or learned in state law. See: *Pennhurst State School & Hospital v. Halderman,* 465 U.S. at 123 N.32.

In this case, the Fifth Circuit based its analysis of Texas state law on an opinion by a Texas state district judge located in Harris County. *Alberti v. Sheriff of Harris County,* 937 F.2d at 997. This state court opinion, however, was never final nor was it reviewed by any higher court in Texas. In fact this state court opinion has been vacated.[10]

Because of the above misinterpretation of unsettled Texas state law by the Fifth Circuit, this case is a textbook example of the practical reasons why federal courts should not adjudicate state law claims. A federal court should either; (1) "abstain" from adjudicating these types of claims; (2) certify them to the appropriate state court system; or (3) dismiss the state claims for lack of jurisdiction.

This Court should grant the writ on these questions because they are important issues of nationwide significance and have not received uniform application throughout the federal court system.

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[10] See: Petition for Writ of Certiorari pp. 14.

III.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER STATE OFFICIALS CAN BE FOUND LIABLE FOR CONDITIONS IN A LOCAL JAIL UNDER *WILSON V. SEITER* WHEN THEIR RESPONSIBILITIES UNDER STATE LAW FOR INMATES IN A LOCAL JAIL ARE NOT CLEARLY ESTABLISHED.

Amici agree with the Petitioners' reasons for granting the writ on this question.[11] These reasons will not be reasserted here. Amici assert, however, that contained within the question presented for review is the basic issue of who can be held liable for violating the Constitution under 42 U.S.C. § 1983.[12]

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[11] See: Petition for Writ of Certiorari pp. 26-29.

[12] Petitioners have framed this question in terms of liability under *Wilson v. Seiter.* See: Petition for Writ of Certiorari, Question Presented Number 4, pp. i. However, supervisory liability is also an issue under 42 U.S.C. § 1983. See: *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 818-821 (1985) (per Justice Rehnquist with the Chief Justice and two Justices concurring and three Justices concurring in judgment). As stated by This Court, questions of the meaning of § 1983 are jurisdictional in nature and can be reviewed by This Court regardless of their being raised by the parties. *Will v. Michigan Department of State Police,* 491 U.S. 58, 63 N. 4 (1989)

A federal court's instruction to State officials on how to comply with state law is barred by the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. at 196. Pendent jurisdiction cannot be used to bypass what the Eleventh Amendment specifically prohibits. Id., 465 U.S. at 121-122. Therefore, This Court has already determined that a legal dispute between state officials and county officials over the meaning or application of state law cannot be heard as a pendent state law claim.

Under the clear meaning of §1983 only a "person" who violates another's constitutional rights can be held liable for the violation of a constitutional right. What is equally clear is that a remedy for violating another's constitutional rights can be issued only against the "person" who violated that right. *See*: 42 USC § 1983 and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818-821 (1985) (Per Justice Rehnquist with the Chief Justice and two Justices concurring and three Justices concurring in judgment).

In the instant case, a remedy for violating the constitutional rights of the plaintiff inmate class was issued against the State defendants without determining if each of the State defendants were "persons" liable for the constitutional violation. In short, did the Texas officials have a legally imposed responsibility for the unconstitutional conditions of confinement in Harris County's jail?

The "actor" is the "person" liable for violations of constitutional rights. The "actor" who is liable is the "person" against whom the remedy can be imposed under §1983. A plurality of This Court has indicated that the "actor" in cases like the instant one, is determined by looking at state law. *City of St. Louis v. Praprotnick*, 485 U.S. 112, 123-129 (1988) (Per Justice O'Connor with the Chief Justice and two Justices concurring)

Texas state law made the officials of Harris County the physical custodians of the plaintiff inmate class and, therefore responsible for the care and treatment of the plaintiff inmate class while housed in Harris County's jail. *See*: Tex. Code Crim. Proc. Art. 104.002 (Vernon Supp. 1993). Under Texas state law, the officials of Harris

County are the "actors" who are responsible for the conditions of confinement at Harris County's jail, regardless of whom is housed within that jail.[13] Therefore, the "person" who is liable and against whom a remedy can be imposed are the officials of Harris County and not the Texas state officials.

However, the Fifth Circuit ignored the clear dictates of Texas state law and determined that a remedy could be imposed against the State defendants and the County defendants.[14] *Alberti v. Sheriff of Harris County*, 937 F.2 at 993-998. A plurality of This Court has determined that the method used by the Fifth Circuit is improper. *City of St. Louis v. Praprotnick*, 485 U.S. at 134 N.1. This Court, however, has never established what method must be used in order to determine the "actor" who is or can be held liable.

In determining who is the "actor" for purposes of imposing liability under §1983, state law must control. Under §1983 only the "actor" who is the constitutional violator can have a remedy imposed against him. This concept is neither new nor radical. It is a basic principle of fairness that only legally responsible wrongdoers can

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[13] See: Petition for Writ of Certiorari pp. 10.

[14] Louisiana courts have determined that local jail officials – parish sheriff – is the "actor" who is liable for the conditions of confinement at parish jails under Louisiana law and not Louisiana state officials. La. Rev. Stat. Ann. 15:824 (West Sup. 1993), *See also: Langley v. City of Monroe*, 582 So.2d 367, 368 (La. App. 2nd 1991), *Cooley v. State of Louisiana*, 533 So.2d 124, 125 (La. App. 4th Cir. 1988 and *Amiss v. Dumas*, 411 So.2d 1137 (La. App. 1st Cir. 1982). The Louisiana Legislature has for sometime mandated that the Parish Officials receive payment per day per head for each Louisiana state prisoner that is held in a parish jail. La. Rev. Stat. Ann. 15:824B.

be found liable in court and have remedies imposed on them.

The question of law presented here is: How should a federal court determine who is the "actor" for purposes of imposing liability on and a remedy against a "person" under 42 U.S.C. §1983? This is a threshold and plenary question under §1983. This Court should grant the writ in this case to resolve these important legal questions.

CONCLUSION

A writ of certiorari should be granted and this case set for oral argument.

The questions presented for review involve threshold issues of jurisdiction under Article III, the Tenth Amendment and the Eleventh Amendment which have remained unanswered by This Court. The questions presented for review involve answered issues of abstention and/or certification of state law claims which were ignored by the Fifth Circuit. The questions presented for review reflect conflicts among the Courts of Appeals. The result reached by the Fifth Circuit conflicts directly with holdings of This Court. Additionally, the proper test for determining the constitutional violator under §1983 is of nationwide importance.

This Court has an obligation to resolve all questions of the jurisdictional authority of federal courts. This is particularly true when the questions are posed by one or more of the Several States. It is This Court's duty to define the jurisdictional authority of the lower federal

courts. The scope of the federal court's jurisdictional authority should not be left to the discretion of the lower federal courts. The jurisdictional questions posited in the Petition for Writ of Certiorari, including the one posed under §1983, should be answered by This Court. This case presents This Court with the opportunity to answer these jurisdictional questions.

The Amici States believe that the questions presented for review in the Petition for Writ of Certiorari are of grave importance to all States. The Amici States feel that This Court should answer the questions presented for review in the Petition for Writ of Certiorari.

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